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In The

# Supreme Court of the United States

HOWARD BRETT BERGER,

*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is NASD* Procedural Rule 8210 contrary to 15 U.S.C. § 78o-3(b)(8)'s requirement that the NASD provide a "fair" disciplinary procedure, when Rule 8210 results in a lifetime industry bar through a procedure that precludes good faith, counsel-advised jurisdictional challenges to its authority to compel testimony, unless the challenger is willing to forfeit all merit defenses if the jurisdictional challenge fails?

2. Is the Securities Exchange Commission ("SEC"), in affirming a lifetime bar sanction imposed by the NASD, obligated under 15 U.S.C. § 78s(d)(2) & (e)(2) to explain why a lesser sanction would be insufficient to meet any legitimate remedial regulatory goal, a question on which there is a current split among the courts of appeals?

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* NASD is the National Association of Securities Dealers. In 2007, the NASD merged its member regulation, enforcement and arbitration functions with the New York Stock Exchange ("NYSE") into the Financial Industry Regulatory Authority ("FINRA"). *See* http://www.finra.org/AboutFINRA/index.html. NASD Procedural Rule 8210 was incorporated into FINRA Rule 8210. *See* FINRA Notice to Members 08-57 dated December 15, 2008. http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=7206.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY AND REGULATORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. In Sustaining the NASD Forfeiture Proceeding, The Court of Appeals Contradicted Well-Settled Doctrine of This Court | 10 |
| II. The SEC Has A Duty to Explain a Lifetime Bar | 14 |
| III. The Justification Advanced By the SEC for the Bar Is Inadequate | 18 |
| CONCLUSION | 19 |

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Summary Order of the United States Court of Appeals for the Second Circuit dated October 1, 2009 ..... App. 1

Opinion of the Securities and Exchange Commission dated November 14, 2008 ..... App. 7

Order of the Securities and Exchange Commission Sustaining the Disciplinary Action Taken By Registered Securities Association dated November 14, 2008 ..... App. 45

Opinion of the Securities and Exchange Commission dated May 4, 2007 ..... App. 47

Order of the Securities and Exchange Commission Sustaining the Disciplinary Action Taken By Registered Securities Association dated May 4, 2007 ..... App. 77

Order of the United States Court of Appeals for the Second Circuit denying petition for panel rehearing dated December 3, 2009 ..... App. 79

Statutory and Regulatory Provisions Involved ..... App. 81

## TABLE OF AUTHORITIES

Page

CASES

*American Power & Light Co. v. SEC*, 329 U.S. 90 (1946) ..... 17

*Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974) ..... 14

*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973) ..... 17

*D'Alessio v. SEC*, 380 F.3d 112 (2d Cir. 2004) ..... 8

*DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93 (2d Cir. 2005) ..... 8

*D.L. Cromwell Invs. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002) ..... 8

*Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) ..... 15

*Karsner v. Lothian*, 532 F.3d 876 (D.C. Cir. 2008) ..... 7

*McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005) ..... 9, 16

*Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920) ..... 11, 14

*PAZ Sec., Inc. v. SEC*, 494 F.3d 1059 (D.C. Cir. 2007) ..... 16

*PAZ Sec., Inc. v. SEC*, 566 F.3d 1172 (D.C. Cir. 2009) ..... 15

*Penfield Oil Co. of Cal. v. SEC*, 330 U.S. 585 (1947) ..... 17

*Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) ..... 15

*Reisman v. Caplin*, 375 U.S. 440 (1964) ..... 11, 12, 14

TABLE OF AUTHORITIES – Continued

Page

*R. H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952) ..... 9

*In re Ruffalo*, 390 U.S. 544 (1968) ..... 15

*Schellenbach v. SEC*, 989 F.2d 907 (7th Cir. 1993) ..... 9

*SEC v. Huff*, ___ F. Supp. 2d ___, 2009 WL 3336016 (S.D. Fla. Oct. 14, 2009) ..... 18

*SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995) ..... 15

*Silver v. NYSE*, 373 U.S. 341 (1963) ..... 16

*In re Specialists Sec. Litig.*, 503 F.3d 89 (2d Cir. 2007) ..... 8

*Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979) ..... 6, 15, 16

*Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) ..... 12

*Ex Parte Young*, 209 U.S. 123 (1908) ..... 10, 11, 12, 14

OTHER CASES

*Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363, 88 SEC Docket 2653 (Aug. 25, 2006) ..... 7

STATUTES

15 U.S.C. § 78(a) ..... 13

15 U.S.C. § 78o-3 ..... 7

15 U.S.C. § 78o-3(b)(8) ..... 9, 13

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 78s ..... 2

15 U.S.C. § 78s(d)(2) ..... 5, 9, 15

15 U.S.C. § 78s(e)(2) ..... 9, 15, 16

15 U.S.C. § 78y(a)(1) ..... 1, 6, 9

15 U.S.C. § 78y(a)(4) ..... 9

26 U.S.C. § 7421 ..... 14

28 U.S.C. § 1254 ..... 1

RULES

NASD By-Law Article V, Section 4(a) ..... 4

NASD Conduct Rule 2110 ..... 4

NASD Procedural Rule 8210 ..... *passim*

TREATISES

Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890 (Feb. 2010) ..... 13

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Howard Brett Berger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the case.

## OPINIONS BELOW

The opinion of the Court of Appeals, *see* appendix ("App.") 1-6, is reported at *Berger v. SEC*, No. 09-0062-ag, 2009 WL 3160620 (2d Cir. Oct. 1, 2009), *rehearing denied*, 09-0062-ag (Dec. 3, 2009). App. 79-80. The relevant orders of the SEC are reported at 2007 WL 1306843 (May 04, 2007), App. 47-78, and 2008 WL 4899010 (Nov. 14, 2008). App. 7-46.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

The Court of Appeals entered its judgment on October 1, 2009, and it denied a timely petition for rehearing on December 3, 2009. The Court of Appeals had jurisdiction under 15 U.S.C. § 78y(a)(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant text of 15 U.S.C. § 78s and NASD Procedural Rule 8210 are printed in the appendix at App. 81-85.

## STATEMENT OF THE CASE

1. In early April 2003, petitioner Berger (who had been formerly registered with the NASD) and his broker, Millennium Brokerage, LLC ("Millennium"), discussed re-registering Berger with the NASD, with Millennium acting as the sponsoring member firm. App. 50. Thereafter, on April 15, 2003, Millennium electronically filed in petitioner's name an initial application for securities industry registration, known as a Form U4, with the Central Registration Depository ("CRD"). App. 51-52. CRD identified various deficiencies in the filing, and despite various curative efforts, these deficiencies were never ultimately resolved. App. 55-57. On August 13, 2003, Millennium filed a Form U5 "terminating Berger's association with Millennium without registration." App. 57. Berger never took employment with Millennium and never re-registered. App. 60.

2. By letter dated January 14, 2004, the NASD demanded petitioner's appearance, pursuant to NASD Procedural Rule 8210, for an on-the-record interview ("OTR") scheduled for January 27, 2004. App. 57-58. This is an investigative hearing, not a disciplinary

enforcement proceeding. On the day scheduled, petitioner's counsel telephoned the NASD indicating that petitioner's non-appearance was "inadvertent" and requested a rescheduled date. *Ibid.* Two days later, the NASD contacted counsel to give petitioner another opportunity to testify by discussing dates for another OTR. App. 13, 58. Counsel advised the NASD that petitioner would now be represented by new securities counsel. *Ibid.*

3. Petitioner's new counsel, a highly experienced securities lawyer, advised petitioner that he was not subject to the NASD's regulatory jurisdiction and that the only way to assert such a jurisdictional challenge was to decline to appear. App. 32-33. Petitioner believed, based on his counsel's expert advice, that appearing would waive his jurisdictional challenge and that not appearing was both appropriate and "legitimate." App. 33. Securities counsel also told Berger that if the NASD established jurisdiction over him, he would have the opportunity to testify and purge any sanction. *Ibid.*

4. In consultation with Berger's newly retained counsel, the NASD agreed to reschedule the OTR for February 12, 2004. App. 13-14, 58. Counsel confirmed this in a January 30, 2004 letter, which also advised the NASD that prior to the scheduled date,

> we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date.

App. 58. Almost two weeks later, on February 11, 2004, counsel informed the NASD that Petitioner would not testify. Counsel explained,

> [t]he grounds for his decision not to appear are based on our view that the NASD does not have jurisdiction over him.

App. 59, JA 329.[1] Counsel stated, however, that petitioner would testify "[i]f it is determined that the NASD does have jurisdiction over him." JA 329.

5. On July 15, 2004, the NASD brought a disciplinary complaint against petitioner charging him with violating NASD Procedural Rule 8210 and Conduct Rule 2110. App. 59.[2] Petitioner answered on August 17, 2004, asserting lack of regulatory jurisdiction as an affirmative defense. *Ibid.* The hearing took place on December 1, 2004 before the NASD Office of Hearing Officers. The jurisdictional defense was vigorously pursued, but it was rejected; and the Court of Appeals upheld its rejection. App. at 3-4.

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[1] "JA" references are to pages of the Joint Appendix in the Court of Appeals.

[2] The basis for the NASD's assertion of jurisdiction over Petitioner, who was not a registered person at the time of the OTR demand, was Article V, Section 4(a) of the NASD's By-Laws, which provides for retained jurisdiction over a former associated person for two years following a firm's termination of that person's association. App. 11 n.8. "Associated persons" includes, by NASD rule, "a natural person who . . . has applied for registration." App. 61. A person applies for registration by signing and submitting a Form U4. *Id.*

Petitioner recognizes that this fact-dependent determination of jurisdiction provides no grist for this Court's mill. What amply merits the Court's attention, however, is that there is no finding – and no basis for a finding – that petitioner's jurisdictional challenge was frivolous, or that it was asserted in bad faith. (App. at 43; "We [the SEC] do not reach the issue of whether Berger sought to thwart NASD").

6. Having established jurisdiction, the NASD did not then allow Berger's testimony, or accept his offer to testify. App. 72. It automatically imposed its most severe penalty: a lifetime bar from associating with any NASD member firm. App. 9.[3]

7. Petitioner appealed to the SEC, under 15 U.S.C. § 78s(d)(2), contending that the statutory fairness requirement meant that a counsel-advised, good faith jurisdictional challenge could not result automatically in the ultimate sanction of a lifetime bar without any consideration of the merits of any substantive charge, and without affording any opportunity to testify and purge the sanction. App. 70-73. Moreover, petitioner insisted that the SEC cannot affirm a lifetime bar without any explanation of why such a draconian bar was necessary to vindicate its regulatory authority. App. 24-32. Petitioner pointed out that the SEC is required to justify sanctions on

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[3] Because of its stigmatizing effect, a lifetime bar, which is instantly revealed on the internet, goes well beyond the disability of not being able to associate with NASD member firms.

remedial grounds, whereas the lifetime bar imposed on petitioner is punitive. App. 24.

8. The Court of Appeals has jurisdiction to review the SEC' s disciplinary rulings under 15 U.S.C. § 78y(a)(1). In a summary order, that court denied Berger's petition for review, rejecting both challenges that petitioner made before the SEC. The court's holding that the SEC was under no duty to explain why a sanction less drastic than a lifetime bar would not adequately serve the remedial aspects of the securities law is in direct conflict with the Fifth Circuit's decision in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

## REASONS FOR GRANTING THE WRIT

This Court's guidance is needed. The type of forfeiture at issue here is, to the best of our knowledge, without parallel. Petitioner asserted a counsel-advised, good faith and objectively plausible claim that the NASD had no regulatory jurisdiction over him and on that basis he resisted compliance with its investigatory demands. Petitioner did not appear at the investigation stage because (a) that proceeding would not consider such a jurisdictional challenge, and (b) he had been advised by new and highly experienced securities counsel that an appearance would constitute a waiver of the jurisdictional challenge. NASD then commenced a single-count disciplinary proceeding based solely upon petitioner's failure to

respond to the investigatory demand. After determining that it had jurisdiction, it barred petitioner for life – without giving him a chance to then testify, and without hearing anything he had to say on the merit of any substantive charges (assuming that the NASD had anything to charge petitioner with). The SEC affirmed. Thus, under the NASD rule (continued by FINRA)[4] the only way that a person can raise a jurisdictional challenge is to abandon his merits defenses.[5] If he succeeds on jurisdiction at the disciplinary hearing, he is fine. If he loses, however, he gets a lifetime bar – even if his challenge to jurisdiction was colorable, on advice of counsel, and in good faith. We know of no regulatory scheme that so operates, and such a procedure clearly defies the "fairness" mandate of 15 U.S.C. § 78o-3.

The questions presented have systemic importance for the regulation of the securities industry. FINRA (NASD's successor) wields frontline investigative and disciplinary authority over the financial industry and the individuals comprising it. *Karsner v. Lothian*, 532 F.3d 876, 880 (D.C. Cir. 2008). It is charged not only with enforcing its own rules, but

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[4] *See* footnote to Question Presented no. 1.

[5] The SEC is quite explicit about this. Quoting *Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363, 88 SEC Docket 2653, 2662 (Aug. 25, 2006), the SEC explains, "the only recourse against possible overreaching by NASD is for the person to whom the [Rule 8210] request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission." App. 72 n.38.

also with assisting the "SEC in implementing and effectuating compliance with the securities laws." *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93, 95 (2d Cir. 2005). The massive scope of FINRA's reach is evidenced by its monthly reports on "Disciplinary and Other FINRA Actions." For just February 2010, this report is 36 pages long, thick with five and six-figure fines, suspensions and debarments.[6]

Presently, a subject of a FINRA investigation has little or no protection under the Constitution and limited recourse by which to challenge or correct regulatory abuses. Lower courts have held that registered securities associations (RSAs), like the NASD and NYSE, are not state actors and, thus, are not directly subject to constitutional due process requirements. *See D'Alessio v. SEC*, 380 F.3d 112, 120 n.12 (2d Cir. 2004). The upshot is, for example, that a subject of their investigations or disciplinary proceedings cannot invoke the Fifth Amendment privilege against self-incrimination, even while a concurrent criminal case is underway, *D.L. Cromwell Invs. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002). Paradoxically, when sued, these RSAs are shielded by quasi-governmental immunity. *See In re Specialists Sec. Litig.*, 503 F.3d 89, 96-99 (2d Cir. 2007); *DL Capital*

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[6] http://www.finra.org/Industry/Enforcement/DisciplinaryActions/MonthlyActions/2010/

*Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93, 97 (2d Cir. 2005).

To the extent that an aggrieved subject has a right to seek review of disciplinary actions, the most meaningful opportunity is with the SEC, 15 U.S.C. § 78s(d)(2), which conducts a *de novo* review of the record, *Schellenbach v. SEC*, 989 F.2d 907, 909 (7th Cir. 1993), and which has authority to modify or cancel sanctions imposed if it finds them to be excessive or oppressive. 15 U.S.C. § 78s(e)(2); *see, generally, R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-95 (2d Cir. 1952). The Court of Appeals has the power to review SEC disciplinary rulings. 15 U.S.C. § 78y(a)(1). But the scope of that review is circumscribed: findings of fact are conclusive if they are supported by "substantial evidence," 15 U.S.C. § 78y(a)(4), and sanctions will only be set aside for an abuse of discretion. *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).[7]

The court below recognized that statutory "fairness" was a proxy for "due process" in the NASD's structuring of procedures for disciplining of members and persons associated with members, 15 U.S.C. § 78o-3(b)(8). *See* App. 6. But it failed to apply those

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[7] Both levels of review, at the SEC and the Court of Appeals, are limited to the "all or nothing" issue of jurisdiction, a perilous gamble that the NASD compels by its refusal to provide a jurisdictional hearing in the investigative stage or a "good faith" exception to the imposition of a sanction for a failed jurisdictional challenge.

standards in accordance with this Court's settled precedents.

## I. In Sustaining the NASD Forfeiture Proceeding, The Court of Appeals Contradicted Well-Settled Doctrine of This Court

When it comes to jurisdictional issues, the NASD provides no *bona fide* hearing, just a Hobson's Choice: submit to the investigatory interview (which is tantamount to a waiver of jurisdictional challenge) or violate Rule 8210 (and then get a hearing). But the penalty for not appearing, even if based on a good faith jurisdictional defense, is a career-ending lifetime bar if jurisdiction is found. Merit defenses are automatically forfeited. Losing a jurisdictional challenge is, therefore, equal to or worse than the penalty for a finding of liability on a substantive charge.

In holding that the NASD procedure satisfied a due process standard, the Court of Appeals contradicted the well-settled law, established by a long line of cases of this Court, starting with *Ex Parte Young*, 209 U.S. 123, 148 (1908). Quite clearly, this regulatory scheme is designed to make jurisdictional challenges prohibitively risky. It is due process in name only. In *Ex Parte Young*, the Court makes this point:

> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company . . . from resorting to the courts to test the validity of

> the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction.

209 U.S. at 148.

That is not to say that a regulatory scheme cannot punish people for failing to comply with their legal obligations, such as the duty to comply with investigative requests for information. But to pass muster under *Ex Parte Young*, good faith challenges to the regulatory authority must be exempted from such draconian punishment. *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920) (Brandeis, J.), makes this point. Under the regulatory scheme in *Oklahoma Operating*, the only way to obtain judicial review of a rate cap was in "proceedings to punish contempt." *Id.* at 336. There, as here, the penalties potentially imposed for an unsuccessful challenge were so severe as to "deter even the boldest and most confident." *Id.* Citing *Ex Parte Young*, the Court held that "judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate . . . " *Id.* at 340. Thus, the Court held that even if the challenge to the rate scheme failed, "a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued *pendente lite*, provided that it also be found *that the plaintiff had reasonable grounds to contest them as being confiscatory*." *Id.* at 338 (emphasis added).

Following *Oklahoma Operating*, *Reisman v. Caplin*, 375 U.S. 440 (1964), underscored the point

that a "good faith" exemption can save an otherwise unconstitutional regulatory scheme. *Reisman* confronted an enforcement structure similar to that presented in *Ex Parte Young*. It involved an IRS investigative summons, which could only be challenged by refusing to appear, and which carried a "fine [for disobedience] not exceeding $1,000 [a substantial amount in 1964], imprisonment for not more than one year, or both." *Id.* at 446-47. But the regulation in *Reisman* survived Court scrutiny, where it had failed in *Ex Parte Young*. The critical difference was that, in *Reisman*, no penalty could be assessed if "the summons is attacked in good faith." *Id.* at 447[8]; *see also Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-16 (2d Cir. 1986). A "good faith" exemption is, thus, the due process minimum.

Here, the NASD enforcement procedures do not have a "good faith" exemption. This is demonstrated by petitioner's case. The NASD barred petitioner despite the fact that he had a good faith basis to object to jurisdiction and did not appear because of

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[8] Contrasting the circumstances in *Ex Parte Young*, the *Reisman* Court explained that in *Young* the Court had taken issue with a regulatory scheme to assess railroad rates, where "the rates could be tested only by a failure to comply, which occasioned a risk of both imprisonment and large fines, *regardless of the willfulness of the failure to comply*." *See Reisman*, 375 U.S. at 446 (emphasis added). In other words, it was the absence of a "good faith" exception in *Young* that caused the due process violation.

the need to preserve that objection and to obtain a hearing.

As the court below implicitly recognized (App. 5-6), settled conceptions of procedural due process should guide courts in determining what a "fair procedure" means under 15 U.S.C. § 78o-3(b)(8). Due process requires that the NASD must either provide a hearing to permit jurisdictional challenges – so as to keep within its jurisdictional reach under the Securities Exchange Act (15 U.S.C. § 78(a), et seq.) – or excuse good faith challenges to jurisdiction from draconian punishment.

Fairness, moreover, is not only statutorily mandated, it is also consistent with the principle that private regulatory mechanisms implementing governmental programs are not exempt from all constitutional scrutiny. *See, e.g.*, Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 891 n.5 (Feb. 2010) (Book Review) (collecting sources). The protections of the Bill of Rights cannot be contracted away to private institutions. *Id.*

In his appeal, petitioner made the point that no comparable judicial or administrative body (including the NYSE) imposes such a harsh regime that effectively insulates the jurisdictional authority of its investigations from judicial or administrative review.

If they did, they too would run afoul of *Ex Parte Young*, *Oklahoma Operating*, and *Reisman*.[9]

## II. The SEC Has A Duty to Explain A Lifetime Bar

The court below erred in a second important respect: it held, despite the statutory "fairness requirement," that the SEC was not required to explain why a lifetime bar order was required. The SEC did make comments on petitioner's past difficulties with regulatory authorities, but they were dicta. App. 25, 75. So too with the Court of Appeals summary order. App. 5. The SEC imposed the bar sanction based *solely* on petitioner's failure to comply with the investigative demands. App. 24-32, 74-75. (Whether the SEC's dicta about petitioner's prior history would

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[9] To support its holding that the NASD's procedures satisfy statutory fairness by providing "a full, albeit delayed, opportunity to litigate the jurisdictional issue after disciplinary proceedings have begun," the Court of Appeals incorrectly relied on *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974). (App. 6). *Bob Jones Univ.* does not stand for the quoted proposition, at least not in a generally applicable sense. All that was decided in *Bob Jones Univ.* is that the federal tax anti-injunction statute, 26 U.S.C. § 7421, is constitutional. The Court reached that conclusion based on the long-standing, common law rule against the use of injunctions to restrain assessment or collection of taxes. *Bob Jones Univ.* has no relevance to cases where someone has to commit contempt, and face draconian penalties as a result, just to get a hearing. After extensive research, we were unable to find a single Supreme Court or Court of Appeals decision, not one, that applied the due process aspect of *Bob Jones Univ.* in the context that the Court of Appeals applied it here.

justify a lifetime bar need not be considered; the same too as with similar remarks by the Court of Appeals.)

The SEC engages in *de novo* review of disciplinary actions and can cancel or modify sanctions if it finds them excessive or oppressive. 15 U.S.C. § 78s(d)(2) & (e)(2). The court below held "that the SEC was not required to impose the least onerous sanction available to it, so long as the sanction it chose was remedial and not excessive or oppressive." (App. 5) (citing *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1174-76 (D.C. Cir. 2009)). That holding conflicts with the Fifth Circuit's holding in *Steadman v. SEC*:

> When the Commission imposes the most drastic sanctions at its disposal, it has a *duty to articulate carefully* the grounds for its decision, *including an explanation of why lesser sanctions will not suffice.*

603 F.2d at 1143 (emphasis added).

The Fifth Circuit's requirement that the SEC explain why a lesser sanction would not suffice is compelled by the remedial nature of an NASD disciplinary proceeding. A permanent bar, like the NASD bar imposed here, is presumptively penal. *In re Ruffalo*, 390 U.S. 544, 550-51 (1968); *Johnson v. SEC*, 87 F.3d 484, 490 (D.C. Cir. 1996); *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (banking industry bar is penal for purposes of statute of limitation); *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995) (reversing lifetime bar due to insufficient showing of likely future violations). It is "the most drastic remed(y) at the SEC's

disposal," *Steadman, supra,* 603 F.2d at 1137 – the "securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). The Fifth Circuit's position requiring an explanation is clearly correct given the requirement that sanctions issued by the NASD must be remedial and not punitive, that is, with "due regard for the public interest and the protection of investors." 15 U.S.C. § 78s(e)(2); *McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005).

*Steadman's* directive – this "duty to articulate carefully" (603 F.2d at 1143) – finds strong support in this Court's decision in *Silver v. NYSE*, 373 U.S. 341 (1963). In *Silver,* the Court held that the NYSE could not unilaterally cut off a non-member's access to stock quotations, "without provision for some method of telling a protesting non-member why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position." 373 U.S. at 361. The Court further explained that "the requirement of . . . a hearing will . . . help in effectuating antitrust policies by discouraging anticompetitive applications of exchange rules which are not justifiable as within the scope of the purpose of the Securities Exchange Act." *Id.* at 361-62.

Since a lifetime bar is presumptively penal, the SEC can overcome that presumption only by explaining why a lesser sanction would be inadequate

to accomplish its remedial goal.[10] Here, the SEC did not overcome that presumption. First, the bar against petitioner does not encourage compliance, like a conditional sanction (in the model of a civil contempt sanction). *See Penfield Oil Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947). Second, petitioner was not a registered securities professional, so the bar cannot be justified as a means of expelling petitioner. Third, the bar was unnecessary to prohibit re-entry because the NASD already has a gate to prevent people from re-registering.

It is vitally important that this Court resolve this split among the Courts of Appeals. Requiring the SEC to explain, with findings and clear reasoning, why someone has to be barred for life rather than suffer some lesser penalty will prevent the SEC from justifying its decision with mere conclusions. Not only will this encourage a more disciplined approach at the SEC's level, but it will make for a more meaningful review by the Court of Appeals.

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[10] We do not suggest that the Court of Appeals should set aside a sanction simply because it is more severe than that imposed in comparable cases, a proposition rejected in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186 (1973). Nor are we arguing that the Court of Appeals should second guess the Commission's choice of remedy. *Cf. American Power & Light Co. v. SEC*, 329 U.S. 90, 118 (1946). The SEC's obligation is simply to provide a rational explanation as to why a lesser sanction would not fulfill the remedial objective sought to be advanced. In this case, the SEC has failed to do so.

## III. The Justification Advanced By The SEC for the Bar Is Inadequate

The sole justification advanced by the SEC in sustaining this draconian forfeiture regulatory system is straightforward: regulatory need. (App. 15-21). Pointing out that Congress has denied subpoena power to the NASD, the SEC insists that the need for rapidly provided information in the securities context is overriding. (App. 16-17). No one would deny that NASD and its successor in enforcement, FINRA, play a vital role in policing the securities industry, and that they need information. But the statute makes plain that this need is not the only consideration. Any process established must be fair. Regulatory need is constrained by claims of individual right.

Indeed, the SEC's argument turns the denial of the subpoena power on its head. Who needs subpoena power if the draconian regulatory procedure now in place is sustained? As matters stand, the NASD is in a far superior position, since a subpoena (including an SEC subpoena[11]) can be resisted on jurisdictional grounds without waiving merits defenses if the challenge fails. Here, by contrast, the demand for information cannot be challenged on jurisdictional grounds unless one is willing to forfeit other defenses if the jurisdictional challenge fails. Such a procedure is not a fair one within the meaning of the statute.

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[11] *See SEC v. Huff*, ___ F. Supp. 2d ___, 2009 WL 3336016 (S.D. Fla. Oct. 14, 2009).

In fact, so far as we know, such a procedure has no counterpart anywhere else in the law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of October, two thousand nine.**

PRESENT:

JON O. NEWMAN,
BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
*Circuit Judges.*

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HOWARD BRETT BERGER,

*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

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**SUMMARY ORDER**
**No. 09-0062-ag**

FOR PETITIONER: Andrew Todd Solomon, Sullivan & Worcester, LLP, New York, NY.

FOR RESPONDENT: Luis de la Torre, Senior Litigation Counsel (David M. Becker, General Counsel, Mark D. Cahn, Deputy General Counsel, and Jacob H. Stillman, Solicitor, *on the brief*), Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision of the Securities and Exchange

Commission ("SEC"), it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED.

Petitioner Howard Brett Berger seeks review of two orders of the SEC, the first sustaining disciplinary action against him by the National Association of Securities Dealers ("NASD")[1], and the second affirming that sanction after our remand for reconsideration. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues raised on appeal.

Berger first contends that the SEC's finding that Berger was subject to NASD's retention jurisdiction was not based on substantial evidence. In applying the substantial evidence standard of review, we uphold the SEC's findings of fact where they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 217 (1938). We review the SEC's legal conclusions for arbitrariness, capriciousness, and abuse of discretion. *Markowski v. SEC*, 34 F.3d 99, 104 (2d Cir. 1994).

NASD has jurisdiction over its members and associated persons, the latter being defined as "natural person[s] who . . . [have] applied for registration

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[1] NASD was consolidated with other regulatory bodies in 2007 to become the Financial Industry Regulatory Authority ("FINRA").

under the Rules of Association," NASD By-Laws, art. I, § dd(1), and it retains such jurisdiction for two years after the effective date of the individual's termination of association, *id.* at art. V, § 4, *available at* www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p009798.pdf. NASD jurisdiction has been held to extend to those applicants who have applied for membership but who have not been approved, including those who have signed and submitted a Form U4. *See, e.g., Dep't of Enforcement, Complainant v. Respondent,* Complaint No. C10010146, 2003 NASD Discip. LEXIS 1, at *9 n.4 (N.A.C. Jan. 3, 2003). We conclude that the finding that Berger signed and submitted a Form U4 within the two years prior to the first on-the-record interview ("OTR") at which he was asked to appear was grounded in the record and was supported by substantial evidence. The initial Form U4 bore Berger's name on the "signature of applicant" line and was twice amended over the month after its submission on April 15, 2003. In addition, the information that was supplied in connection with those amendments in all likelihood could only have been provided by Berger, and Berger had strong incentives to seek registration in April 2003.

Berger next contends that the SEC abused its discretion in sustaining a sanction against him that permanently barred him from associating with any NASD member firm. Under the Administrative Procedure Act ("APA"), we review the SEC's sanction determinations for whether they are "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We overturn such sanctions only if they are unwarranted in law or without justification in fact. *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005). We have discretion to reduce or eliminate a sanction if it is "excessive or does not serve its intended purposes." *Id.*

We find the SEC's sanction to be warranted in law and adequately justified in its decisions, and note that the SEC was not required to impose the least onerous sanction available to it, so long as the sanction it chose was remedial and not excessive or oppressive. *See PAZ Sec., Inc. v. SEC (PAZ II)*, 566 F.3d 1172, 1174-76 (D.C. Cir. 2009). In light of Berger's past disciplinary history with NASD; the circumstances of his failure to appear at the two OTRs; the importance of the Millennium investigation to NASD, which Berger's conduct at least somewhat impeded; and the seriousness of Rule 8210 violations in general, we conclude that the SEC was within its discretion in sustaining the agency's permanent bar against Berger.

Finally, Berger argues that NASD's procedures fail to meet the fairness requirement of the Securities Exchange Act of 1934 ("SEA"), *see* 15 U.S.C. § 78o-3, because they do not allow an associated person to challenge NASD's jurisdiction over him or her prior to an OTR. In essence, Berger contends that NASD should adopt what he alleges to be the New York Stock Exchange's practice of imposing conditional bars on persons who violate its rules. We have held,

however, that NASD is not a state actor subject to due process requirements, *D'Alessio v. SEC,* 380 F.3d 112, 120 n.12 (2d Cir. 2004), and to the extent that NASD provides those persons who refuse to appear at an OTR a full, albeit delayed, opportunity to litigate the jurisdictional issue after disciplinary proceedings have begun, *see Bob Jones Univ. v. Simon,* 416 U.S. 725, 746-47 (1974), we are satisfied that its procedures comply with the SEA's fairness requirement.

We have reviewed Berger's remaining contentions and conclude that they are without merit. For the foregoing reasons, Berger's petition for review is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950/November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary
Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

*Reconsideration of Sanction Pursuant to Remand*

Upon motion of Commission, Court of Appeals remanded Commission determination sustaining registered securities association's sanction against former associated person of member firm for Commission to consider (1) whether certain facts mitigated misconduct of former associated person and (2) whether the sanction served a remedial purpose. *Held,* sanction imposed by association is *sustained.*

APPEARANCES:

*Andrew T. Solomon,* of Sullivan & Worcester LLP, for Howard Brett Berger.

*Marc Menchel, Alan Lawhead,* and *Michael J. Garawski,* for NASD.

Case remanded: November 14, 2007
Last brief received: January 25, 2008

I.

This proceeding is here on our motion to the United States Court of Appeals for the Second Circuit for remand. On May 4, 2007, we issued an opinion and order sustaining NASD's[1] findings that Howard Brett Berger, an individual who applied for registration with an NASD member firm, failed to appear and provide information at two on-the-record interviews ("OTRs"), in violation of NASD Rule 8210 and Conduct Rule 2110.[2] We found the sanction imposed by

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[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before the consolidation, we continue to use the designation NASD.

[2] *Howard Brett Berger,* Exchange Act Rel. No. 55706 (May 4, 2007), 90 SEC Docket 1766, *remanded, Howard Brett Berger v. SEC,* No. 07-2692 (2d Cir. Sept. 13, 2007) (remand order).

(Continued on following page)

NASD – barring Berger from associating with any NASD member in any capacity – neither excessive nor oppressive.[3]

Berger subsequently appealed our determination to the Second Circuit. On August 29, 2007, we moved the Second Circuit to remand the matter to the Commission for the sole purpose of reconsidering the sanction portion of our opinion in light of the recent ruling of the United States Court of Appeals for the District of Columbia Circuit in *PAZ Sec., Inc. v. SEC.*[4] On September 13, 2007, the Second Circuit granted our motion and remanded the Berger matter to the Commission for further proceedings.[5]

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NASD Rule 8210 requires members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members to adhere to "high standards of commercial honor and just and equitable principles of trade." A violation of another NASD rule, such as Rule 8210, constitutes a violation of Conduct Rule 2110. *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2504 n.50; *Stephen J. Gluckman*, 54 S.E.C. 175, 185 & n.31 (1999).

[3] NASD also assessed costs.

[4] 494 F.3d 1059 (D.C. Cir. 2007) (holding that the Commission abused its discretion by failing to address certain mitigating factors raised by the petitioners and by failing to identify any remedial purpose for the sanctions it approved).

[5] *Berger v. SEC*, No. 07-2692 (2d Cir. Sept. 13, 2007). The Second Circuit issued its mandate on November 14, 2007, and in December 2007 the Commission requested further briefing by the parties.

## II.

Neither the factual findings that establish the violations nor the findings of violations themselves are at issue on remand. With this opinion, we nonetheless expressly affirm those determinations. We summarize some of the findings here to provide the necessary background for our discussion of sanctions. Our reconsideration of the sanction portion of this case is informed by the D.C. Circuit's *PAZ* decision.[6] *PAZ* also involved the failure to respond to NASD requests for information. In remanding *PAZ* to the Commission, the D.C. Circuit instructed us to reconsider, among other things, whether the sanctions were excessive or oppressive "in light of the factors raised in mitigation and to consider . . . whether the sanctions serve[d] a remedial purpose" as required by the Securities Exchange Act of 1934.[7] In this opinion, we reconsider these factors insofar as they pertain to Berger.

Berger was registered with NASD from December 1, 1992 until April 19, 2001, when he relinquished his securities industry registration. During that period, he worked for several member firms in various capacities, including as a general securities representative and general securities principal, and also as an associate compliance director and compliance officer. In his capacity as associate compliance director and

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[6] *PAZ*, 494 F.3d 1059.

[7] *Id.* at 1061.

compliance officer at two member firms, Berger was responsible for, among other things, filing applications for securities industry registration. For nearly two years afterward, Berger was unregistered and not associated with any member firm while he worked at a financial software company and at Professional Traders Fund, LLC ("PTF"), a hedge fund.

Under NASD rules, securities licenses do not lapse until two years after registration has terminated.[8] After they lapse, a person must retake the licensing examinations to become registered again.[9] As the two-year renewal deadline for his securities licenses approached, Berger sought to renew his securities industry registration because he wanted to avoid retaking the licensing examinations and also to capture some of the commissions that his hedge fund was paying to Millennium Brokerage, LLC ("Millennium"). On April 15, 2003, four days before his securities licenses were due to expire, Berger applied for securities industry registration through Millennium

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[8] NASD asserts jurisdiction over, and has the ability to obtain information from, a person whose association with a member has been terminated or whose registration has been canceled, for two years following the date of that person's termination of registration. NASD By-Laws, Article V, Section 4.

[9] NASD Membership and Registration Rules 1021(c) and 1031(c) require any formerly registered person who has been unregistered for a period of at least two years immediately preceding the receipt by NASD of a new application for registration to pass an examination in order to renew his registration.

by submitting a Form U4. Although Berger applied for registration, his application required several amendments because the information supplied, relating primarily to Berger's disciplinary history, was incomplete. Ultimately, those deficiencies were never resolved and on August 13, 2003, Millennium terminated Berger's association without registration.

Five months later, on January 14, 2004, NASD requested Berger's appearance at an OTR scheduled for January 27, 2004 in connection with NASD's investigation of potential circumvention of day-trading rules and noncompliance with certain credit provisions by Millennium's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. An NASD staff supervisor involved in the investigation testified at Berger's disciplinary hearing that NASD staff had been inquiring into PTF's role in day-trading at Millennium in April 2003, when Berger was applying for registration. The supervisor also testified that Millennium's filing of Berger's Forms U4 coincided with the suspected activities at Millennium and that NASD staff had received information that Berger had access to a back-office system (otherwise limited to Millennium's own principals and representatives) that enabled Berger to "look at" at least 125 PTF accounts and "see the trading levels, the buying power," and "the profit

and loss in the accounts."[10] NASD's written request, which was sent by first class and certified mail, advised Berger that he was "obligated to appear at the date and time specified in [the] letter" and included an addendum warning that, if he did not appear, he might be subject to "an NASD disciplinary action, and the imposition of disciplinary sanctions, including a bar from the securities industry, suspension, censure and/or fine." Berger did not challenge NASD's jurisdiction at that time. He failed to appear, but his then-current counsel ("Initial Counsel") contacted NASD after the scheduled time for the OTR had elapsed. NASD agreed to accommodate Berger by scheduling a second OTR for a later date.

Prior to the rescheduled OTR, however, Berger changed attorneys, replacing his Initial Counsel with another attorney from a different law firm ("Second Counsel"). On January 30, 2004, Second Counsel sent a letter to NASD announcing his appearance and stating that, prior to the rescheduled date, "we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date." On February 2, 2004, NASD sent Berger another letter by first class and certified mail, with a copy to his attorney, confirming the rescheduled date and advising Berger that "failure to appear may result in

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[10] Although NASD counsel sought at the hearing to provide further background on the investigation, Berger's counsel objected repeatedly to the introduction of such information.

a recommendation . . . that a disciplinary action be instituted against you which may result in the imposition of sanctions such as censure, fine, suspension, or bar." On February 11, 2004, Second Counsel responded to NASD with a letter advising NASD that Berger "will not appear" for the second OTR and stating without explanation that "[t]he grounds for his decision not to appear are based on our view that the NASD does not have jurisdiction over him." Berger subsequently failed to appear at that second OTR.

NASD By-Law Article I(dd)(1) defines a "person associated with a member" as "a natural person who is registered or has applied for registration." NASD Notice to Members 99-95 states that "any person who signs and submits a Form U4 is an associated person."[11] When Berger, an experienced securities professional and former compliance officer, applied to renew his registration with NASD, thereby submitting himself to NASD's jurisdiction, he agreed that he understood and consented to abide by NASD's rules, including the requirement to provide information requested by NASD for its investigations. We sustained NASD's finding that Berger filled in his personal information and executed an electronic signature on an application for registration with Millennium a few days before the expiration of NASD's two-year

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[11] NASD Notice to Members 99-95 (Dec. 1, 1999).

period of retained jurisdiction over him. We agreed with NASD that it retained jurisdiction over Berger.

Having established NASD's jurisdiction, we found that Berger violated NASD Rules 8210 and 2110 when he failed to appear at the two OTRs. We noted that Berger did not respond in any manner to the first OTR request until the day of the scheduled OTR, and then only after the time for the scheduled OTR had elapsed. Even after NASD accommodated him by scheduling a second OTR after consultation with Second Counsel, Berger failed to appear.

## III.

Exchange Act Section 19(e)(2)[12] requires us to review a disciplinary sanction imposed by NASD upon a member firm or associated person "to determine whether the sanction 'imposes any burden on competition not necessary or appropriate' to further the purposes of the [Exchange] Act, or is 'excessive or oppressive.'"[13]

A. We first set forth the regulatory framework with respect to sanctions for failure to respond to an NASD request for information.[14] The Exchange Act requires

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[12] 15 U.S.C. § 78s(e)(2).

[13] *PAZ*, 494 F.3d at 1064.

[14] *See PAZ Sec. Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5123, *appeal filed*, No. 08-1188 (D.C. Cir. May 13, 2008).

that the rules of a self-regulatory organization ("SRO") like NASD be designed for the protection of investors,[15] and Exchange Act Section 15A requires that NASD enforce compliance by its members and their associated persons with the Exchange Act, the Exchange Act rules, and NASD rules.[16] "Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations."[17]

NASD lacks subpoena power, however. It must therefore "rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its

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[15] 15 U.S.C. § 78o-3(b)(6) (stating that an association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that its rules are designed to, among other things, protect investors and the public interest).

[16] 15 U.S.C. 78o-3; *see also Report of Investigation Pursuant to Section 21(A),* Exchange Act Rel. No. 51163 (Feb. 9, 2005), 84 SEC Docket 3129, 3130 ("As a registered association, the NASD has a statutory obligation to comply with the Exchange Act, and to enforce compliance by its members with the Exchange Act and its own rules."). Exchange Act Section 19(h)(1) authorizes the Commission to suspend or revoke the registration of an SRO if the Commission finds that such SRO has failed to enforce compliance with the provisions of the Exchange Act, the rules thereunder, or the rules of the SRO. 15 U.S.C. § 78s(h)(1).

[17] *Charles C. Fawcett, IV,* Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157.

members and associated persons."[18] Rule 8210 "provides a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations."[19] The rule is at the heart of the self-regulatory system for the securities industry. The language of Rule 8210 – "No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to the Rule"[20] – is "unequivocal" with respect to an associated person's obligation to cooperate with NASD information requests.[21] In responding to Rule 8210 requests, therefore, "[d]elay and neglect on the part of members and their associated persons undermine the ability of the NASD to conduct investigations and thereby protect the public interest."[22] The failure to respond impedes NASD's ability to detect misconduct that threatens investors and markets.

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[18] *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998).

[19] *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993). *See also Elliot M. Hershberg*, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498 (stating that "compliance is essential to NASD's self-regulatory function because NASD lacks subpoena power" and that "[f]ailure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions") (citations omitted), *affd*, 210 Fed. Appx. 125 (2d Cir. 2006).

[20] NASD Manual, Procedural Rule 8210(c).

[21] *See Michael Markowski*, Exchange Act Rel. No. 32562 (June 30, 1993), 54 SEC Docket 1211, 1216-17, *petition for review denied*, 34 F.3d 99 (2d Cir. 1994).

[22] *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996).

Vigorous enforcement of Rule 8210 helps ensure the continued strength of the self-regulatory system – and thereby enhances the integrity of the securities markets and protects investors – by preventing members and their associated persons who demonstrate their unfitness by failing to respond in any manner to Rule 8210 requests from remaining in the securities industry.[23] Members and their associated persons who fail to respond in any manner to Rule 8210 requests present "too great a risk" to the markets and investors to be permitted to remain in the securities industry.[24]

NASD applied the NASD's Sanction Guidelines (the "Sanction Guidelines")[25] when it determined to sanction Berger for the violation of Rule 8210 and bar him from associating with any NASD member in any capacity. Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[26] The Sanction Guidelines state that,

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[23] *See Fawcett,* 91 SEC Docket at 3157 (sustaining sanction of a bar for failure to comply with NASD requests for information).

[24] *Id.*

[25] *See Fawcett,* 91 SEC Docket at 3148.

[26] The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice

(Continued on following page)

"[i]f the individual did not respond in any manner, a bar should be standard."[27] Where mitigation exists, or where the individual did not respond in a timely manner, the recommended maximum sanction is a two-year suspension.[28] The guideline for violations of Rule 8210 is one of only three out of a total of eighty sanction guidelines that recommend a bar as the standard sanction.[29] The imposition of a bar as the standard sanction for a complete failure to respond to NASD information requests "reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct

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of the types of disciplinary sanctions that may be applicable to various violations. *Id.* The Sanction Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD adjudicators, which the Sanction Guidelines define as Hearing Panels and the National Adjudicatory Council. *Id.*

[27] NASD Sanction Guidelines (2001 ed.) at 39.

[28] *Id. See also Justin F. Ficken,* Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 696 n.38; *Hershberg,* 87 SEC Docket at 498.

[29] *Fawcett,* 91 SEC Docket at 3157 n.27. The other two are the sanction guidelines applicable to the conversion of customer funds and to cheating during broker-dealer qualification examinations. *Id.* A bar may be imposed for many other violations, such as intentional or reckless misrepresentations or omissions of material fact, where NASD deems the particular misconduct at issue to be egregious. *See, e.g.,* NASD Sanction Guidelines at 93.

is properly remedied by a bar."[30] "NASD's barring of [Rule 8210 violators] is [thus] 'consistent with the Exchange Act's basic purpose of protecting public investors.'"[31] Because we conclude that "removing those who present such a risk is necessary to further 'the Exchange Act's basic purpose of protecting public investors,' a bar in such circumstances – a complete failure to respond and no mitigation – has a remedial, and not a punitive, purpose."[32]

NASD's standard sanction of a bar protects investors not only by removing from the securities industry an individual or firm that has already shown a refusal to be investigated but also by deterring all current and future SRO members and associated persons from failing to cooperate.[33] NASD members and associated persons who know of wrongdoing and are approached by NASD with requests for information as part of an investigation should not have an incentive to fail to cooperate. The sanction for any misconduct an NASD investigation uncovers could be less than a bar, and wrongdoers should know

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[30] *Fawcett*, 91 SEC Docket at 3157.

[31] *Dennis A. Pearson, Jr.*, Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1640 (quoting *Gershon Tannenbaum*, 50 S.E.C. 1138, 1141 (1992)).

[32] *PAZ*, 93 SEC Docket at 5127-28 (internal citations omitted).

[33] *See PAZ*, 494 F.3d at 1066 (stating that "general deterrence" may be "considered as part of the overall remedial inquiry") (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

that cooperation is their best chance of avoiding the bar that they may receive for non-cooperation (in the absence of mitigating factors).

B. We next consider the arguments that Berger raises in support of his claim that a permanent bar is excessive or oppressive and imposes an unnecessary burden on competition. On remand, Berger argues that no sanction is appropriate because of his "objectively reasonable belief' that he was not subject to NASD's jurisdiction, that barring him from association with a broker or dealer does not serve a remedial purpose, and that his reliance on counsel is a mitigating factor that warrants a lesser sanction. For the reasons discussed below, we reject these arguments.

1. Berger contends that, because he had an "objectively reasonable" belief that he was not subject to NASD's jurisdiction, he should not have been sanctioned at all.[34] Our prior opinion in this case determined that NASD does not have a mechanism for resolving questions of jurisdiction prior to a respondent's scheduled appearance at an OTR; that NASD followed its rules in this proceeding; that its procedures accorded with the "fair procedure[s]"

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[34] We address here Berger's argument that the existence of a jurisdictional defense precludes sanctions altogether. Berger also argues that his jurisdictional defense is a mitigating factor in the sanctions analysis, which we take up in addressing his advice-of-counsel claim.

contemplated by Exchange Act Section 15A(b)(8);[35] that subjecting oneself to NASD's disciplinary process, interposing one's objection, and relying on NASD's procedures is the appropriate route to challenge NASD jurisdiction; and that NASD had jurisdiction over Berger. None of these conclusions is open to challenge on remand. Berger does not explain how, in light of them, his claim that he had a "colorable basis for objecting" to NASD's requests for testimony under Rule 8210 should immunize him from sanctions for failing to comply.

The only authority Berger cites for his arguments is *Fiero v. SEC*[36], an unpublished opinion, which the court of appeals stated was "a summary order, which cannot be cited, let alone relied upon."[37] Moreover, *Fiero* is distinguishable from the facts at issue here.

Respondent Fiero received and ultimately refused to comply with a request from an individual identified as NASD's Deputy Director of Market Surveillance (the "Deputy Director") that Fiero appear for testimony pursuant to the version of Rule 8210 then in effect.[38] The court of appeals reversed and vacated the Commission's order affirming NASD's

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[35] 15 U.S.C. § 78o-3(b)(8).

[36] No. 98-4103, 1999 WL 33952140 (2d Cir. Jan. 20, 1999) (unpublished opinion) (reversing and vacating *John J. Fiero*, 53 S.E.C. 434 (1998)).

[37] *Fiero v. SEC*, No. 98-4103, slip op. at 2 (2d Cir. Mar. 26, 1999) (denying rehearing).

[38] *Fiero*, 1999 WL 33952140, at *1.

sanctions against Fiero.[39] The court determined that NASD's Market Surveillance Committee ("Committee") did not have the authority to request the investigative testimony and that a reasonable person would have thought that the Deputy Director was acting on behalf of that Committee when requesting that Fiero testify. However, the court in *Fiero* distinguished the facts before it from a case in which "testimony or information is sought from witnesses by those NASD committees with appropriate authority," stating that under those circumstances "witnesses are not permitted to place conditions on their testimony."[40]

That is precisely the case here. For the reasons stated in our prior opinion, we found that NASD staff were authorized to seek Berger's appearance pursuant to Rule 8210. We previously found, as had NASD, that Berger played an "active role in completing" the initial Form U4, which was filed four days before his securities licenses were due to expire, and the first and second amended Forms U4, filed over the next month. The record showed that during the period from late March 2003 to mid-May 2003, Berger initiated the registration process; filled out and forwarded to Millennium a template of personal information in a back-and-forth process with its chief compliance officer (the individual responsible for filing Forms U4 at the firm); signed the Form U4 electronically by

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[39] *Id.* at *4.

[40] *Id.* at *3.

typing in his own name; and supplied detailed Form U4 information that was previously unavailable in the Central Registration Depository ("CRD") in response to deficiency notices from NASD. These findings concerning Berger's actions undermine his claim that he reasonably believed that he had not applied for registration. While Berger testified that he had "no recollection of receiving or signing" the Form U4, he does not claim that, at the time he received and refused to comply with NASD's requests for testimony, he made any attempt to refresh his recollection by contacting Millennium or to obtain copies of any documents. For these reasons, we reject Berger's claim of an "objectively reasonable" belief.

2. Berger contends that a permanent bar is punitive rather than remedial because NASD has made no determination of his overall fitness or the likelihood that he will commit future misconduct. Rather, according to Berger, NASD's basis for barring him was "really general deterrence; punish Berger to ensure that the next person complies."

As we have explained above, the risks presented by persons who, in the absence of mitigating factors, completely fail to respond to Rule 8210 requests are appropriately remedied by a bar. Berger provides no explanation for his failure to comply with NASD's first request for information, other than his first counsel's comments in oral argument before the NAC indicating that Berger left the matter entirely to his attorney, who "failed to get back to the NASD in time." Berger's only stated reason for not complying

with the second request was a jurisdictional defense that, as discussed, is belied by what the evidence shows about his own actions with respect to the Forms U4. Berger provided no information in response to either request and did not offer to provide any such information until nearly sixteen months after the first request, after a disciplinary proceeding had been brought, a hearing held, and a bar imposed. Even then Berger offered to comply only on the condition that NASD eliminate the sanction against him. As discussed below, Berger has failed to show that the circumstances of this case mitigate his violation.

In addition, Berger has a prior disciplinary history. NASD considered the serious nature of Berger's previous misconduct, which included flipping, supervision, and registration violations that carried substantial sanctions. That his settlements with NASD, involving significant, multiple acts of past misconduct, "occurred nearly ten years ago" and did not "involve[ ] violations of Rule 8210 or a failure to cooperate with an investigation," as he argues, does not mean that they have no bearing on his present fitness to remain in the securities industry. Viewing the circumstances of Berger's failure to respond to its information requests in light of his previous violations, NASD determined that Berger's misconduct posed a serious risk to investors.

To minimize his failure to comply in any manner with the Rule 8210 requests and its implications for his present fitness, Berger argues that NASD is acting as if he were "accused of serious wrongdoing,

threatening to commit future misconduct, and abjectly refusing to testify without cause in order to avoid punishment." Berger contends that none of this is true, that in general terms he has simply tried to preserve his "privacy" and "time," and, therefore, that a bar is not warranted. He further asserts that not all Rule 8210 violations are the same and that, while "[s]ome may be accused of underlying wrongdoing," he was not.

However, "a request for information is no less serious because NASD issues the request in an effort to prevent or uncover misconduct rather than to unearth the details of misconduct of which it is already aware."[41] To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of NASD's investigation would shift the focus from NASD's perspective at the time it seeks the information and disregard intervening events. It would also ignore the fact that refusal to cooperate with an investigation can prevent NASD from determining and establishing whether wrongdoing occurred, undermining NASD's ability to protect the investing public.[42] Berger's violative conduct does not cease to be serious because it was allegedly motivated by a desire to avoid the loss of privacy and time that is inherent in compliance with any information request.

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[41] *PAZ*, 93 SEC Docket at 5131.

[42] *See id.* at 5131-32.

Nor does it diminish the seriousness of Berger's failure to provide information that he may have been, in his words, "merely a witness" in an investigation that he assumes was not "impacted" by his refusal to testify.[43] Berger may not second guess NASD's information requests.[44] Moreover, the requests for testimony concerned information essential to NASD's investor-protection efforts. Given his access to Millennium's back-office systems, Berger was well-situated to provide potentially valuable information, and his assumptions about the investigation are unwarranted and unsupported.[45]

As discussed, an NASD staff supervisor testified at the hearing that, while conducting a routine examination of Millennium, NASD staff detected the potential circumvention of day-trading rules and noncompliance with margin regulations by the firm's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. Exchange Act Section 7 incorporates rules (specifically, Regulation T) of the Board of Governors of the Federal Reserve governing margin requirements and prescribes lending limits for the initial extension

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[43] *See supra* note 10.

[44] *Morton Bruce Erenstein*, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3120 (stating that a "member or associated person may not 'second guess[]' an NASD information request. . . ."), *petition denied*, No. 07-15736, 2008 WL 4216552 (11th Cir. Sept. 16, 2008).

[45] *See, e.g., supra* text accompanying note 10.

of credit on securities "[nor the purpose of preventing the excessive use of credit for the purchase or carrying of securities."[46] The Commission has "note[d] the importance of the extension of credit rules promulgated under Exchange Act Section 7," which "protect public customers from the potential consequences of over-leveraging their securities purchases, and preserve the public interest by maintaining the financial integrity of broker-dealers."[47] In 2001, in approving proposed NASD rule changes that specifically addressed risks associated with day-trading, and that included a per-account minimum-equity requirement, the Commission explained that "[g]iven the potential for significant losses to those persons who engage in day-trading activities, legislators and regulators have scrutinized the practice and have taken steps to protect investors and limit financial risks to investors, broker-dealers, and securities markets."[48] The Commission found that the proposed rules "are designed to reduce excessive and unnecessary risk of financial loss to market participants" and thereby increase "overall market integrity."[49]

Berger also argues that a permanent bar is punitive because it virtually assures that an individual

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[46] 15 U.S.C. § 78g(a).

[47] *See John Thomas Gabriel,* 51 S.E.C. 1285, 1293 (1994).

[48] Order Approving Proposed Rule Changes Relating to Margin Requirements for Day Trading, 66 Fed. Reg. 13608, 13611, 13616 (Feb. 27, 2001).

[49] *Id.* at 13617.

threatened with a permanent bar for initially not responding will never comply with an NASD information request. According to Berger, a conditional bar – a bar that would remain in place only so long as he refused to comply with Rule 8210 – would be remedial because it could coerce compliance with Rule 8210 and therefore would result in less harm to the investigation. Berger's argument, however, omits the fact that NASD's rules do not provide for a conditional bar. Nor is there any statutory requirement that NASD provide for conditional bars. In rejecting a similar argument that a bar was inappropriate where a respondent offered to comply with a Rule 8210 request after having refused to do so for fourteen months, we stated that "NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules governing investigations."[50] In addition, timely compliance is essential to the prompt discovery and remediation of wrongdoing. We agree with NASD that a conditional bar could result in a delay in compliance with NASD's information request as an individual calculates whether refusing to comply would be more advantageous than providing the requested information and when compliance would best suit his or her own interests, with no assurance that the information would ever be provided, much less while it was still useful.

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[50] *Hershberg*, 87 SEC Docket at 498.

Moreover, this case illustrates the deficiencies of a conditional bar as a sanction for failure to comply with Rule 8210. Millennium terminated or withdrew its registration on March 16, 2005, was expelled from NASD membership on July 12, 2005 for non-payment of fines, and accepted on July 28, 2005 a $125,000 fine and censure for "various compliance violations."[51] These events took place fourteen months or more after Berger was first asked to testify. Although Berger suggests that they show that the relevant NASD investigation was not affected by his failure to cooperate, there is no indication that these events relate to the relevant NASD investigation (the subject matter appears unrelated). To the contrary, NASD argues, "Berger's failure to testify impeded NASD's investigation by depriving NASD of the ability to ask for facts and explanations regarding day-trading and Regulation T issues concerning Millennium and the PTF account" and that "[l]argely as result of Berger's refusal to testify," NASD was not "able to determine whether Millennium engaged in any violative activity with respect to the PTF accounts." Berger argues that his conduct was not serious because NASD could have "resumed its investigation" after he "offered to testify" in a June 7, 2005 affidavit as "part of his

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[51] Berger attaches to the appendix to his opening brief information relating to Millennium's recent disciplinary history and its 2005 expulsion from NASD membership. Rule 323 of our Rules of Practice, 17 C.F.R. § 201.323, permits us to take official notice of any "material fact" and, accordingly, we take official notice of the Millennium information.

appeal" of the Hearing Panel's March 23, 2005 decision. However, the events here demonstrate NASD's need for prompt cooperation and why a respondent may not substitute his judgment for NASD's with respect to its priorities, resource allocation, and manner of conducting an investigation.

The cases Berger cites to support a conditional bar are inapposite. None involves a complete failure to respond to an NASD information request. Several involve a failure to comply with a court order where a conditional sanction carried the potential to remedy the harm.[52] Moreover, the cases cited by Berger involve coercion by conditional sanction through the use of subpoena power, judicial enforcement of subpoena power, and judicial contempt powers.[53] These are powerful tools to obtain the sought-after information,

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[52] *See, e.g., Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988) (remanding proceeding to determine, among other things, whether parent, who had been held in contempt for failure to comply with a child-support order, would purge the contempt judgment by paying his arrearage); *Smith v. Sullivan*, 611 F.2d 1050 (5th Cir. 1980) (reversing contempt judgments against sheriff and other public officials for failure to comply with a district court order limiting the inmate population of a county jail, where lifting of contempt sanctions was conditioned on inmate population not exceeding a certain number during specified dates).

[53] In *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 593-95 (1947), for example, the court held that a contempt judgment that does not include relief of a coercive nature is punitive. However, that case involved Commission subpoena authority, which can be judicially enforced. NASD has no such authority.

but NASD does not have such powers. The question here is whether a bar is necessary or appropriate to safeguard NASD's ability to investigate questionable activity. We believe it is and reject Berger's argument that NASD's sanction of a permanent, as opposed to conditional, bar is punitive and excessive.

3. Berger next contends that, even if his conduct warranted a sanction, his reliance on counsel was a mitigating factor that should trigger a lesser sanction than a bar. Citing the "principal considerations" enumerated in the introductory section of the Sanction Guidelines, Berger identifies as a mitigating factor "[w]hether the respondent demonstrated reasonable reliance on competent legal or accounting advice."[54] He also notes that the Sanction Guidelines provide that a respondent's intent, recklessness, or negligence with respect to the violation is to be considered. Berger argues that his reliance on Second Counsel's advice "negates any finding that he acted willfully in violating NASD rules."

Berger cites to a three-page affidavit that he created and submitted to NASD on June 7, 2005 – following the ruling by the Hearing Panel, but prior to the hearing of his appeal before NASD's National Adjudicatory Council (the "NAC").[55] The affidavit states that the advice that Second Counsel provided

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[54] NASD Sanction Guidelines at 9.

[55] Following the Hearing Panel decision but before the NAC hearing, Initial Counsel resumed his representation of Berger.

to Berger "[c]an be summarized" in the following terms: (1) "you do not have to appear for the OTR because you are not subject to the NASD's jurisdiction;" (2) "if you appear for the OTR, you will waive your jurisdictional defenses;" and (3) "if the NASD (incorrectly) determines that you are subject to their jurisdiction, the sanction will be conditional and you will be given an opportunity to testify to avoid the sanction."

The affidavit also states that "[a]fter receiving [Second Counsel's] initial advice," Berger "questioned [Second Counsel] several times about the consequences of not appearing. Each time, he firmly reiterated his advice, assuring [Berger] that [Berger] was not subject to the NASD's jurisdiction, but even if [he] were, this [was] the appropriate way to challenge jurisdiction." The affidavit adds that Second Counsel "[n]ever" advised Berger that "[Berger] could receive a permanent sanction as a result of [his] nonappearance," and moreover, had counsel advised him otherwise, Berger "would have appeared." The affidavit states further that Berger "hired an expert attorney [Second Counsel] who told [him] that [Berger] was not subject to the NASD's jurisdiction and that [his] nonappearance was not only legitimate but the only means for asserting [his] jurisdictional rights." The affidavit asserts that, "[b]ecause [Berger] acted reasonably in light of the advice [he] received and in good faith, [he] believe[s] the severe sanction imposed on him was unjustified." Berger argues that he is entitled to "mitigation credit" reducing his bar

to a two-year suspension based on his reliance on Second Counsel's advice.

As we noted in our prior opinion, Berger does not claim that he failed to appear at the first OTR on the advice of counsel. Berger seeks to rely on advice of counsel with respect to the second OTR.

In our prior opinion, we recognized that a valid claim of reliance upon counsel may have a mitigating effect on sanctions. To constitute mitigation, however, the claim must have sufficient content and sufficient supporting evidence. Both are lacking in this case. Indeed, the evidence that establishes that NASD had jurisdiction over Berger is flatly inconsistent with Berger's account of his actions with regard to the Forms U4 and undercuts his assertions of reasonable, good-faith reliance on counsel.

As a legal matter, Berger, citing *SEC v. Howard,* argues that he need not "hit each of the 'elements'" that courts and the Commission commonly consider in deciding whether to credit an advice-of-counsel claim.[56] Those elements are that the person made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice.[57]

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[56] 376 F.3d 1136, 1147 (D.C. Cir. 2004).

[57] *Markowski v. SEC,* 34 F.3d 99, 105 (2d Cir. 1994); *C.E. Carlson v. SEC,* 859 F.2d 1429, 1436 (10th Cir. 1988); *SEC v.*

(Continued on following page)

Contrary to Berger's contention, *Howard* does not excuse a less than "complete" advice-of-counsel claim in this case. The *Howard* court considered evidence of advice of counsel in making a determination about an essential element of liability that the plaintiff must prove: whether there was substantial evidence that Howard acted with the state of mind (scienter) necessary to violate the applicable substantive law. As we have held previously, scienter is not an element of a Rule 8210 violation.[58] An advice-of-counsel claim is not relevant to liability in this case, but instead, only potentially as to sanctions. The *Howard* court did not address when a claim of reliance on advice of counsel will qualify as mitigation of an established violation for purposes of determining what remedial sanction is in the public interest.

The Commission reviews the sanctions against Berger with "due regard for the public interest and the protection of investors," which is at issue even if a respondent did not act with scienter.[59] Reasonable reliance on competent legal advice is simply one

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*Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). *See also Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 813 n.22 (2004); *Anthony H. Barkate*, 57 S.E.C. 488, 497 n.19 (2004); *Toni Valentino*, 57 S.E.C. 330, 338-39 & n.11 (2004).

[58] *Rouse*, 51 S.E.C. 581 (1993) (rejecting the view that we must find scienter to find a violation of the predecessor of Rule 8210). *Cf. Joseph G. Chiulli*, 54 S.E.C. 515, 522 (2000) (finding no scienter requirement for Rule 3110).

[59] 15 U.S.C. 78(e)(2); *see PAZ*, 494 F.3d at 1065.

factor to be considered in the overall sanctions analysis and can be evidence of a less culpable mental state that justifies a reduced sanction.[60] However, when a respondent is found to have committed violations, he should not too easily avoid a sanction that is necessary for the protection of the investing public. We believe that the respondent asserting such reliance must provide sufficient evidence to the body making the sanction determination that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice. Courts consider it important that "the advice of counsel [the client] received was based on a full and complete

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[60] *See, e.g., Goldfield*, 758 F.2d at 467; *SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992) (where evidence of attorney's advice "in a formal, unqualified opinion letter" that was also received and not questioned by the clients' "disinterested independent auditor, a partner at one of the country's largest accounting firms who had substantial expertise in [the relevant area of] accounting and auditing," coupled with "no suggestion" that the clients "did not act in good faith," established "[g]ood faith reliance on counsel," considering it as "a factor in determining the propriety of injunctive relief"); *Savoy*, 665 F.2d at 1315 n.28 (even when the four factors are established, reliance on advice of counsel "is only one factor to be considered in determining the propriety of injunctive relief"); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1101-02 (2d Cir. 1972) (advice of counsel "may be a factor to consider in deciding whether to grant injunctive relief' where the defendant "relie[s] in good faith on counsel's advice" and "counsel's interpretation of the law" is "'neither frivolous nor wholly unreasonable"). Berger cites no case rejecting these principles.

disclosure."[61] Further, it "isn't possible to make out" an advice-of-counsel claim "without producing the actual advice from an actual lawyer."[62] The Seventh Circuit rejected a defendant's argument that "reliance on advice of counsel exculpates his conduct" because the defendant "offered nothing more than his say-so."[63] The court noted that "[h]e did not produce any letter from a securities lawyer giving advice that reflected knowledge of all material facts; he did not produce any opinion letter, period. Nor did [he] offer the live testimony of any securities lawyer."[64]

Berger's advice-of-counsel claim is deficient in both of these respects. During the period from NASD's first request for Berger's testimony on January 14,

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[61] *SEC v. Merchant Capital*, 483 F.3d 747, 772 (11th Cir. 2007); *accord Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 642 (D.C. Cir. 2008) (that respondent "failed to disclose the [pertinent] information to [his counsel], who lacked independent knowledge of this information," "substantially undercuts his [reliance on counsel] argument"; " 'Reliance on advice of counsel will not be available to the defendant if he failed to disclose all relevant facts to the attorney.' ") (citation omitted); *Howard*, 376 F.3d at 1148 (in crediting reliance-on-counsel argument, stating that outside counsel "oversaw the closing of the first offering at its law offices, that it drafted the documents for the second offering," and that inside and outside counsel "approv[ed] of" transactions challenged in the case).

[62] *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007).

[63] *Id.* at 455-56.

[64] *Id.* at 456; *accord Eugene T. Ichinose, Jr.*, 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not "show with any specificity what advice [respondent] may have received from" counsel).

2004 to the Hearing Panel's decision on March 23, 2005, Berger and Second Counsel made only the barest of references to advice of counsel. These references occurred in letters to NASD, in arguments advanced during a pre-hearing conference and the NASD hearing and in briefs, and in one short exchange between Second Counsel and Berger at the December 2004 hearing.[65] None of these references contains information about what advice Second Counsel offered or what he had been told in rendering this advice.[66]

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[65] At the December 2004 hearing, Second Counsel asked Berger: "[W]as it on advice of counsel that you didn't come in?" Berger replied, "For the on-the-record interview, yes." That exchange, prompted by a Hearing Panel member's question, was abruptly curtailed by Second Counsel's assertion of attorney-client privilege. However, the attorney-client privilege "cannot at once be used as a shield and a sword[,]" and the privilege "may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (citations omitted), *cert. denied*, 502 U.S. 813 (1991).

[66] In his affidavit, Berger appears to criticize the quality of Second Counsel's advice, noting that Second Counsel "did not advise me of the consequences of asserting [attorney-client] privilege with respect to my 'advice of counsel' defense, or even that the decision whether or not to waive it was mine." However, Berger "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. . . ." *Link v. Wabash, R.R.*, 370 U.S. 626, 633-634 (1962).

Not until June 7, 2005, during his appeal to the NAC, did Berger seek to introduce evidence of any details of his communications with Second Counsel, in the form of his affidavit drafted under the renewed representation of his Initial Counsel. Because Berger had given no substantive testimony on the advice-of-counsel claim, he deprived the Hearing Panel and the NAC of a proper airing of the claim, including cross-examination, and of the opportunity to assess his credibility. Berger also presented no evidence to corroborate the assertions in his affidavit, such as an affidavit or testimony from Second Counsel.[67]

Berger's affidavit contains no description of what disclosure he made to Second Counsel and whether Berger provided him with all relevant facts, nor has Berger cited anything else in the record that does.[68] This is particularly meaningful in light of what the record shows Berger would have known, but did not include in his testimony at the hearing, about the Forms U4 and, at a minimum, his claimed uncertainty about his own actions with regard to the

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[67] Berger asserts that nothing precluded NASD from obtaining testimony or an affidavit from Second Counsel. NASD does not have subpoena power and could not have compelled Berger's attorney to testify. In addition, it is Berger's obligation to marshal all evidence in his defense. *See Robert Thomas Clawson*, 56 S.E.C. 584, 595 & n.25 (2003), *petition denied*, 2005 WL 2174637 (9th Cir. 2005) (unpublished opinion).

[68] *See, e.g., Hal S. Herman*, 55 SEC 395, 403 (2001) (finding no reliance on advice of counsel where respondent could not establish that he made full disclosure to counsel).

Forms, which would have been important for counsel to know in assessing jurisdiction. Due to the lack of evidence about what Berger told his counsel, the record does not show that Berger relied reasonably and in good faith on advice that NASD did not have jurisdiction over him and that even if NASD did have jurisdiction, the sanction would be conditional and Berger would be given an opportunity to testify to avoid the sanction.

Record support is also lacking for Berger's assertions about the legal advice he received. By its own terms, Berger's affidavit purports only to "summarize[ ]" Second Counsel's advice. Second Counsel's February 11, 2004 letter to NASD merely stated that "NASD does not have jurisdiction over [Berger]" and that Berger was unwilling to testify until "it is determined that NASD does have jurisdiction." That Second Counsel raised certain arguments during the litigation of the proceeding, cited by Berger in his reply brief on remand, is not sufficient to establish that counsel advised Berger at the time NASD requested his testimony that failing to appear was legal or that Berger's reliance on such advice was reasonable.[69]

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[69] Even examining Second Counsel's statements during the proceeding does not help Berger. Statements that lack of jurisdiction "was not a frivolous defense," that it "has substance," and that "[w]e have a lawfully legitimate right to challenge NASD's jurisdiction" show nothing more than that Second Counsel argued that Berger had a colorable jurisdictional argument,

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We note that the record with respect to Second Counsel's advice contrasts with the evidence in *Morton Bruce Erenstein.*[70] In *Erenstein,* we sustained NASD's imposition of a one-year suspension instead of a bar and noted that NASD "appropriately considered," in mitigation of Erenstein's Rule 8210 violation, his attorney's apparently "good faith interposition of his objections. . . ." The record demonstrated that Erenstein appeared at an OTR and testified until his counsel objected to NASD's requests for information about Erenstein's tax returns. Counsel subsequently sent a letter and other communications to NASD detailing the basis for his objection.[71] Here, by contrast, Berger did not rely on counsel's advice in failing to appear at the first OTR and refused to appear at the second OTR. Neither he nor his counsel attempted to explain to NASD at the time of the scheduled testimony the basis for Berger's claim that NASD lacked jurisdiction. Instead, Second Counsel's letter responding to NASD's letter scheduling the second OTR stated merely that "we will determine

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not necessarily one that was likely to prevail. We can find no statement anywhere in the record by Second Counsel that if NASD proves jurisdiction, "the sanction will be conditional and [Berger] will be given an opportunity to testify to avoid the sanction."

[70] *Erenstein,* 91 SEC Docket at 3114.

[71] *Id.* at 3124. Erenstein eventually produced the withheld information eight months after it was first requested, after receiving a Wells notice informing him that NASD staff intended to recommend institution of disciplinary proceedings.

whether the NASD has jurisdiction over Mr. Berger" and "will notify you of our intention as to whether or not Mr. Berger will testify on that date." Second Counsel's subsequent letter advising NASD that Berger would not appear provided no basis for his jurisdictional objection, referring only to "our view that the NASD does not have jurisdiction" and declining to address the matter further until "the NASD determines to bring an 8210 proceeding."

Berger appears to concede that an advice-of-counsel claim is not mitigating if it is premised on a strategy to avoid full compliance with applicable regulatory requirements.[72] Berger seems to suggest that even if the record gave rise to such a concern, which the Hearing Panel expressed here, he could dismiss that concern from consideration by asserting in his affidavit that he did not seek "to thwart the NASD's investigation or to foster strategic advantage."

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[72] *See Valentino*, 57 S.E.C. at 338 (stating that "[w]e have repeatedly held that reliance on counsel does not excuse an associated persons's obligation to supply information or testimony or otherwise cooperate with NASD investigations," nor "should it mitigate the sanctions imposed" under circumstances in which the respondent, "in determining whether to testify," was "weighing a concern regarding her continued ability to work in the securities industry if she failed to testify against a concern about the potential consequences to her husband if she pro[f]fered testimony" and "engaged in dilatory tactics to evade questioning by NASD"). *Cf. Steadman*, 967 F.2d at 642 (in considering whether defendants raising an advice-of-counsel claim "acted in bad faith," noting lack of "any motive" or "anything, to gain.").

We understand the basis of the Hearing Panel's concern. Berger has stated that he did not want to spend the time required to provide the requested information. However, given the lack of evidence that Berger relied on the advice of counsel, we do not need to reach the issue of whether Berger sought to thwart NASD. On the record before us, we have no basis to determine whether Berger's reliance on advice-of-counsel claim is valid. Thus, we cannot accept Berger's advice-of-counsel claim as mitigating.

Based on the rationale behind the recommendation of a bar as the standard sanction for a complete failure to respond to an NASD request for information, and given the absence of any mitigating factors in this case, we find that the bar against Berger is neither excessive nor oppressive.

Berger argues for the first time in his reply brief that barring him from association with any broker or dealer would impose an undue burden on competition. He asserts that the "stigma" of a bar would impede his ability to engage in lawful economic activity, particularly in the securities industry. This is not the type of competitive concern that Exchange Act Section 19 meant to be considered.[73] Otherwise,

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[73] The requirement that sanctions imposed by an SRO not impose an unnecessary or inappropriate burden on competition was added to Section 19 of the Exchange Act by the Securities Reform Act of 1975 (the "SRA"), Pub. L. No. 94-29, 89 Stat. 97 (codified as amended in scattered sections of 15 U.S.C.), a legislative effort to enhance competition among securities exchanges

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NASD could never impose a bar on an individual or firm because the bar would always have the same effect that Berger describes. Even lesser sanctions could have the same such effect and therefore would be forbidden in Berger's view. We do not believe that Exchange Act Section 19 embraces consideration of the reasons advanced by Berger for competitive harm.

Accordingly, we find that the bar against Berger does not impose any burden on competition and is neither excessive nor oppressive, because, as set forth above, the bar serves a remedial rather than a punitive purpose and Berger has not identified any factors that mitigate his violations.

An appropriate order will issue.[74]

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and markets. The SRA's intent, and consequently, that of Exchange Act Section 19, is to "break down the unnecessary regulatory restrictions which ... restrain competition among markets and market makers. ..." S. Rep. No. 94-75, at 12-13 (1975). The SRA does not address the economic impact on former securities professionals barred from further participation in the industry.

[74] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES; Commissioner WALTER not participating).

Florence E. Harmon
Acting Secretary

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950 / November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary
Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Howard Brett Berger, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55706/May 4, 2007

Admin. Proc. File No. 3-12393

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

*Failure to Provide Requested Testimony*

Former associated person of member firm of registered securities association failed to appear at two on-the-record interviews. *Held,* association's findings of violation and the sanction imposed are *sustained.*

APPEARANCES:

*Andrew T. Solomon,* of Sullivan & Worcester LLP, for Howard Brett Berger.

*Marc Menchel, Alan Lawhead,* and *Michael J. Garawski,* for NASD.

Appeal filed: August 15, 2006
Last brief received: November 14, 2006

I.

Howard Brett Berger, an individual who applied for registration with Millennium Brokerage, LLC ("Millennium" or the "Firm"), an NASD member firm, appeals from NASD disciplinary action. NASD found that Berger failed to appear at two on-the-record interviews ("OTRs"), in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.[1] NASD

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[1] NASD Procedural Rule 8210 requires members and associated persons to provide testimony in connection with any NASD investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. Violations of NASD rules such as NASD Procedural Rule 8210 constitute conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110. *See, e.g., Justin F. Ficken,* Securities Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685 (holding that a violation of NASD Procedural Rule 8210 constitutes conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110); *Elliot M. Hershberg,* Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 497 (holding that the failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade), *aff'd, Hershberg v. SEC,* No. 06-1086-og, 2006 U.S. App. LEXIS 32225 (2d Cir. 2006); *Stephen J. Gluckman,* 54 S.E.C. 175, 185 (1999) (same).

barred Berger from associating with any NASD member in any capacity.[2] To the extent we make findings, we base them on an independent review of the record.

II.

Berger was registered with NASD from December 1, 1992 until April 19, 2001. During that period, he worked for several member firms in various capacities, including as a general securities representative and general securities principal, and also as an associate compliance director and compliance officer.[3] Berger relinquished his registration on April 19, 2001 when his employer firm filed a withdrawal from membership. That firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") for Berger on May 2, 2001.

For nearly two years afterward, Berger remained unregistered and was not associated with any member firm. Since April 2001, Berger has been employed as the chief financial officer of Mat/Financial Systems Group ("FSG") a financial-software company. He is also a fund manager at Professional Traders Fund, LLC ("PTF"), a hedge fund. Berger became acquainted with Millennium in 2002, when FSG entered into a

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[2] NASD also assessed costs.

[3] In his capacity as associate compliance director and compliance officer at two member firms, Berger was responsible for, among other things, filing applications for securities industry registration.

licensing agreement with Millennium to provide the Firm with financial software. Soon thereafter, PTF became a Millennium client.

Berger Initiates the Registration Process with Millennium

In late March or early April 2003, Berger discussed registration with Lisa Esposito, the Millennium registered representative who serviced PTF's accounts at the Firm. Berger testified at the hearing that he informed Esposito that he was considering "relicensing [himself]" and "reestablishing" his "registration status" in order to "capture some of the commissions" that PTF was paying to Millennium. Berger also sought to renew his registration because he "knew . . . [he] was coming up on the anniversary" of the renewal deadline for his securities licenses and wanted to avoid retaking the licensing examinations.[4] He asked Esposito "what, if anything, [he could] do to get some preliminary information going in case [he made] this decision prior to [his] license lapsing,

[4] NASD Membership and Registration Rules 1021(c) and 1031(c) require any formerly registered person who has been unregistered for a period of at least two years immediately preceding the receipt by NASD of a new application for registration to pass an examination in order to renew his registration. Under these rules, securities licenses do not lapse until two years after registration has been terminated. After they lapse, an applicant would have to retake the licensing examinations. Berger's securities licenses were due to expire on April 19, 2003.

because the last thing [he wanted] to do is make a decision to do it and have to reregister."

According to Berger, Esposito said that she would "speak to the powers that be" at Millennium regarding his inquiry. Berger testified that Esposito "came back to [him] shortly thereafter" and informed him that she would be sending him an e-mail instructing him "to fill out [his] preliminary personal instruction for a [Form] U-4" and "proceed from there." Esposito subsequently e-mailed him a blank "template request for some information" that contained a "preset box to put information in." Berger then filled in his "full name, [his] Social Security number, . . . [his] personal information, which was [his] residential history and [his] employment history" and e-mailed the template back to Esposito.[5]

Millennium Files Berger's Initial Form U4 and Two Amendments Thereto

On April 15, 2003, four days before Berger's securities licenses were due to expire, Millennium filed Berger's initial application for securities industry registration (the "Initial Form U4") electronically with the Central Registration Depository

[5] There is no copy of the template in the record, but the parties seem to agree that the template was not the Form U4 itself.

("CRD").[6] Christopher Ranni, at the time Millennium's chief compliance officer and the individual responsible for filing Forms U4 at the Firm, had initiated and filed Berger's application at the direction of Millennium's chief executive officer.[7]

Ranni testified that he did not have direct contact with Berger. However, at the hearing, he explained his usual procedure for processing Forms U4. Ranni stated at the hearing that his practice was to send "out an e-mail to the candidate" and that normally the applicant would "make changes to the form or basically just sign it and send it back" to him.[8] Ranni described his usual business practice – one that he followed "[w]ithout exception" – of

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[6] As relevant here, a Form U4, or "Uniform Application for Securities Industry Registration or Transfer," is the application by which an individual registers with NASD. The record contains copies of the Form U4 and its subsequent amendments that were filed electronically by Millennium on behalf of Berger. Both parties obtained their respective copies of those forms from CRD and submitted them as hearing exhibits.

[7] Millennium's chief executive officer ("CEO") had sent an e-mail to Ranni instructing him to initiate the registration process for Berger. At his OTR, the CEO testified that he had heard that Berger had filed a Form U4 with Millennium in March or April 2003. Millennium's president was also aware of Berger's interest in registration. At his OTR on February 6, 2004, Millennium's president testified that Millennium had attempted to register Berger and stated that he "believe[d] registration may have been – they – we might have started the process for registration" on Berger's behalf.

[8] At the hearing, Berger asserted that he did not "recall e-mail from Mr. Ranni."

exchanging e-mails with an applicant in order to obtain information for input into the web-based CRD system.[9] Describing the registration procedure, Ranni explained that he would first "obtain the Social Security number, date of birth and name [of the applicant]." Ranni would use that information to access the applicant's historical information on the CRD website. Ranni would then "set up the initial application" by incorporating the applicant's personal history into an electronic draft Form U4 before e-mailing a hyperlink for the draft form to the applicant. The applicant would be able to access and edit the draft form electronically via the hyperlink. During that time, CRD automatically denied Ranni access to the form until the applicant released the form by e-mailing it back to Ranni. When the hyperlink would reappear on Ranni's pending Form U4 "staging window" – signaling that the applicant had released the form back to him – Ranni would "check [the form] for accuracy" and then "submit it to the NASD for registration."[10]

Ranni explained that the only parts of the draft Form U4 that he would fill out after it was returned

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[9] The record does not contain any e-mails between Ranni and Berger. However, Ranni testified at the hearing that he could "only assume" that the e-mail replies he received during his e-mail exchange with the applicant were from Berger.

[10] The Hearing Panel credited Ranni's testimony about his procedures. There is no explicit credibility finding with respect to Berger's testimony.

to him by the applicant were "jurisdictions and other information that you don't leave up to the candidate to fill out themselves." When the Hearing Panel asked Ranni whether he ever deviated from his usual business practice, he responded, "Never. The only way to file U4s is electronically." Because he was the sole individual "handling the registrations for the [F]irm," he "chose the easiest route possible and that was to let the candidate do it themselves." Millennium did not produce manually-signed, paper copies of Berger's Form U4 to NASD staff because the Firm claimed that it had created only electronic versions of the form.

Berger's electronic signature was typed[11] on the Initial Form U4 under the heading, "Signature of *Applicant*."[12] Ranni's electronic signature followed

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[11] In his hearing testimony, Berger asserted that he did not recall signing a form electronically:

> Q: When is the next time you saw any kind of document that had "U-4" on it?
>
> A: I don't think I received another copy.
>
> Q: Did you ever electronically sign your name?
>
> A: Not that I recall.

Berger insisted that he "didn't see" the Form U4 application, but instead saw a "template document." When the Hearing Officer asked Berger what he understood would happen after supplying his personal information to Esposito, Berger replied that it was his "understanding that Millennium would hold that information and that would hold any expiration date on [his] license pending [his] making a decision on what we wanted to do."

[12] Italics in original. According to the "Signature Section" of the Form U4, a signature "includes a manual signature or an

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under the heading, "Signature of *Appropriate Signatory*." The Initial Form U4 included an initial disclosure reporting page ("DRP") that reported a judgment entered against Berger on November 1, 2001, six months after his previous firm had filed a Form U5 terminating his registration. Because that judgment was identified as an "initial" disclosure, *i.e.*, it was being reported for the first time, it would not have appeared in Berger's CRD record prior to the filing of the Initial Form U4. Ranni testified that he "never update[d] candidates' DRP pages," but instead, "[left] it up to the candidate" to do so.

On April 17, 2003, CRD notified Ranni that there were deficiencies in Berger's DRPs. According to Ranni, a Form U4 filing would not be approved for registration "until the deficiencies [were] cleaned up." He asserted that, whenever he received deficiency notices, he "would send an additional e-mail to the candidate saying there were discrepancies or deficiencies . . . [a]nd that they needed to be corrected." Ranni testified that he would then go through the same

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electronically transmitted equivalent" and "is effected by typing a name in the designated signature field" which constitutes a "legally binding signature." The language preceding the applicant's signature on the Form U4 also permits the "applicant's agent" to type the applicant's name in the form's signature field. The applicant's signature on the Form U4 indicates the applicant's agreement to comply with, among other things, all provisions, including by-laws, rules, and regulations of the self-regulatory organizations selected on the application.

e-mail process with the candidate in order to correct the deficiencies.

On April 23, 2003, Millennium filed an electronic amendment to the Initial Form U4 (the "First Amended Form U4"), with both Berger's and Ranni's electronic signatures.[13] The First Amended Form U4 contained several changes from the Initial Form U4. Among other things, the text of one DRP response was amended, and the First Amended Form U4 included two additional DRPs. For example, the response to a disclosure question asking whether Berger was involved in a sales practice violation that contained a claim for compensatory damages of at least $5,000 was changed from a "No" to a "Yes." The corresponding initial DRP disclosed an arbitration that concluded on October 4, 2001 with the explanation that "I was not employed at the firm at the time of the complaint." A second initial DRP disclosed a $162,000 arbitration award, with the explanation that "I was named as the chief compliance officer for failure to supervise." Many of the narrative responses in the First Amended Form U4 appeared in the first-person singular, giving the impression that Berger had made the revisions himself.

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[13] The "temporary registration" section of the First Amended Form U4 was completed. Berger's electronic signature was typed in the temporary registration signatory section. The temporary registration section of the Initial Form U4 had not been completed.

On April 25, 2003, CRD generated a second notice informing Ranni that the DRPs in the First Amended Form U4 contained additional deficiencies. Ranni testified at the hearing that, in response to the deficiency notice, he went through the same e-mail process to correct those deficiencies. Thereafter, on May 12, 2003, Millennium filed another electronic amendment to the Initial Form U4 (the "Second Amended Form U4") that included additional revisions. Both Berger's and Ranni's electronic signatures appeared on the Second Amended Form U4.

On May 13, 2003, CRD generated a third notice flagging deficiencies in the Second Amended Form U4. Those deficiencies were never resolved.

Millennium Files a Form U5 to Remove Berger from the Firm's Books

On August 13, 2003, Millennium filed a Form U5 terminating Berger's association with Millennium without registration. At the hearing, Ranni testified that once the deficiencies in an applicant's Form U4 "were over 90 days old, [he] U-5'd the candidate" because it was "the only way to get him off the [Firm's] books." The Form U5 listed Berger's withdrawal as "voluntary." There was no suggestion in the Form U5 that the Initial Form U4 was filed improperly.

Berger Fails to Appear at Two OTRs

On January 14, 2004, NASD sent a letter to Berger requesting his appearance, pursuant to NASD

Procedural Rule 8210, at an OTR scheduled for January 27, 2004 in connection with an NASD investigation into potential day trading violations at Millennium.[14] Berger failed to appear at the January 27, 2004 OTR. Later that day, following Berger's failure to appear, Berger's counsel informed NASD staff that his failure to notify staff of Berger's unavailability for the scheduled OTR was "inadvertent" and requested that the OTR be rescheduled. Berger retained new counsel thereafter.

On January 30, 2004, after consultation with Berger's new counsel, NASD scheduled a second OTR for February 12, 2004. Also on January 30, 2004, Berger's new counsel sent NASD staff a letter confirming the second OTR and stating that, prior to the scheduled date, "we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date."

On February 2, 2004, NASD sent a letter to Berger requesting his appearance, pursuant to NASD

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[14] At the hearing, Gregory Marro, an NASD staff supervisor, testified that, while conducting a routine examination of Millennium, NASD staff detected the potential circumvention of day trading rules and noncompliance with certain regulations by the Firm's day trading clients, with the possible involvement and awareness of Millennium principals and personnel. Marro indicated that Millennium's filing of Berger's Forms U4 coincided with the suspected activities at the Firm, and that NASD staff had been inquiring into PTF's role in day trading at Millennium at that time.

Procedural Rule 8210, at the second OTR scheduled for February 12, 2004. On February 11, 2004, the day before the second OTR, NASD staff contacted Berger's new counsel to confirm Berger's appearance at the scheduled OTR. Berger's new counsel informed NASD staff that Berger would not appear at that OTR and challenged NASD's jurisdiction over Berger. Berger failed to appear at the February 12, 2004 OTR.

NASD Proceedings

On July 15, 2004, NASD filed a complaint against Berger alleging that he failed to appear at the two OTRs. In his answer to the complaint, Berger admitted to not appearing at the OTRs but asserted that NASD lacked jurisdiction over him. Following a hearing, the Hearing Panel barred Berger in all capacities.

Berger appealed the Hearing Panel's decision to NASD's National Adjudicatory Council (the "NAC"). On July 28, 2006, the NAC affirmed the Hearing Panel's findings and sanction. The NAC determined, among other things, that, by applying for registration with NASD, Berger became an associated person of Millennium subject to NASD jurisdiction. The NAC concluded that Berger violated NASD rules by failing to appear for the OTRs. The NAC affirmed the imposition of a bar against Berger. This appeal followed.

## III.

We must determine whether Berger engaged in the conduct found by NASD, whether the conduct violated the NASD rules he was found to have violated, and whether those rules were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934.[15] NASD Procedural Rule 8210 requires that associated persons provide information requested by NASD. Berger does not dispute that he did not appear at the scheduled OTRs, nor does he dispute that he received notice of the OTRs. We have held previously that the failure to respond to NASD's requests for testimony demonstrates a *prima facie* violation of NASD Procedural Rule 8210.[16]

Berger argues that NASD lacked jurisdiction over him because he had been unregistered and not associated with any member firm for more than two years at the time that NASD sought his testimony.[17] Both Berger and NASD agree that he never became registered through Millennium and that he neither was employed by nor acted for the Firm.

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[15] *See* Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1).

[16] *Ficken*, 89 SEC Docket at 690-91.

[17] NASD asserts jurisdiction over, and has the ability to obtain information from, a person whose association with a member has been terminated or whose registration has been canceled, for two years following the date of that person's termination of registration. NASD By-Laws, Article V, Section 4.

However, NASD By-Law Article I(dd)(1) defines a "person associated with a member" as "a natural person who is registered or has applied for registration." NASD Notice to Members 99-95 states that "any person who signs and submits a Form U4 is an associated person."[18] NASD found that Berger filled in his personal information and executed an electronic signature on an application for registration with Millennium on April 15, 2003, a few days before the expiration of NASD's two-year period of retained jurisdiction over him.

Berger argues that he never signed the initial and amended Forms U4 (collectively, the "Forms U4") that Millennium submitted on his behalf, and therefore, was not an associated person of Millennium. Based on the preponderance of the evidence, we find that: (1) Berger signed and submitted the Initial Form U4, the First Amended Form U4, and the Second Amended Form U4 before the 2004 OTR requests; (2) Berger was "a person associated with" Millennium because he "applied for registration" under NASD rules; and (3) as an associated person of Millennium, Berger was subject to NASD disciplinary jurisdiction during the relevant period.[19]

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[18] NASD Notice to Members 99-95 (Dec. 1, 1999).

[19] *See, e.g., Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992) (stating that the "correct standard is preponderance of the evidence"); *Roy Ray Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (same) (internal citations omitted). *Cf. Sandra K. Simpson*, 55 S.E.C. 766, 798 (applying preponderance of the evidence

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In weighing the evidence, we look at the totality of the record and consider the full panoply of available evidence, instead of reviewing each piece of evidence in isolation.[20] It is undisputed that Berger initiated discussions with Millennium regarding the renewal of his registration status. Berger had strong incentives to seek registration in April 2003. He testified at the hearing that he wanted to avoid retaking the licensing examinations that he would have to take if his securities licenses were to expire. He also sought to capture commission income that PTF was paying to Millennium. Berger progressed swiftly from the discussion stage to taking concrete steps to renew his registration. Within days of his conversation with Esposito, for example, Berger completed a "template" that Esposito sent him to initiate the registration process. Berger admits inputting his name, Social Security number, and other personal information into the template and e-mailing it back to Esposito for processing.

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standard in administrative proceeding). *See also United States v. Gumesindo Montano*, 250 F.3d 709, 713 (9th Cir. 2001) (explaining that under the preponderance of the evidence standard, the relevant facts must be shown to be more likely than not).

[20] *Cf. Terrance Yoshikawa*, Exchange Act Rel. No. 53731 (Apr. 26, 2006), 87 SEC Docket 2924, 2933-34 (stating that "isolated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial evidence. . . ."); *Laurie Jones Canady*, 54 S.E.C. 65, 79 (1999) (noting that law judge's credibility determination was based on the totality of the record), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

Berger asserts that it is irrelevant that he supplied information to Esposito in a "template" and that Ranni may have relied on such information to prepare the Forms U4. Berger also does not dispute that an electronic signature, purporting to be his, appears on the Initial Form U4 and its two subsequent amendments. Rather, Berger argues that, without evidence that he signed the forms or a witness to the signing, there is no way to prove that he "signed and submitted" the Forms U4. Berger asserts that this absence of proof of the "mechanical" process of "actually signing the document" destroys NASD jurisdictional claims.

Berger points out that NASD Electronic Filing Rule 1140(c) requires that a member firm retain a signed, paper original of any Form U4 submitted to CRD.[21] The representations and signature in an

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[21] NASD Electronic Filing Rule 1140(c) provides that, "[a]s part of the member's recordkeeping requirements, it shall retain the [applicant's] signed Form U4 and make it available promptly upon regulatory request." Approximately five months after the events at issue in this case, NASD published NASD Notice 03-56 (Sept. 29, 2003), which accompanied the announcement of amendments (effective October 2003) to NASD Rule 1140(c) and contains the following colloquy:

> Q: Is the electronic Form U4 based on a signed, paper Form U4?
>
> A: Yes, the electronic Form U4 is based on a signed, paper Form U4. Rule 1140(c) clarifies that all Forms U4 filed electronically must be based on a signed Form U4 that is provided to the member or applicant for membership by the person.

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electronic Form U4 are to be "based" on the paper copy. Millennium stated that it had no paper copy of any of Berger's Forms U4.[22] There were no witnesses to the signing of the Forms U4: nobody saw Berger complete or sign the forms. As a result, Berger asserts, there is no probative evidence that he signed a Form U4. Berger contends that, without proof of his signature, the circumstantial evidence of his association with Millennium is weak.

However, the Supreme Court has stated that "circumstantial evidence can be more than sufficient" in civil actions,[23] and we have previously considered circumstantial evidence to be persuasive.[24] We agree with NASD that the record demonstrates that Berger played an "active role in completing" the Initial Form U4 and the First and Second Amended Forms U4. In addition to initiating the registration process with

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> Q: Who will retain the signed Form U4 and how will NASD obtain a copy if it needs it?
>
> A: NASD Rule 1140 requires the member to retain the signed Form U4 and make it available promptly upon regulatory request.

[22] Millennium was being investigated for other record-keeping and reporting violations at this time.

[23] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 and n.30 (1983) (declining to depart from preponderance of the evidence standard in civil actions and noting sufficiency of circumstantial evidence, particularly in fraud cases).

[24] *See Donald M. Bickerstaff*, 52 S.E.C. 232, 238 (1995) (finding witness's testimony to be persuasive even though it was "circumstantial").

Esposito and filling out the template, Berger appears to have supplied detailed information that was previously unavailable in CRD, particularly in response to the deficiency notices that followed the Initial and First Amended Forms U4. The information in those subsequent filings added data to Berger's CRD record that were highly likely to have been provided by Berger, and the revisions made were, as NASD found, "expressed in first person language, demonstrating that Berger supplied all such information and statements himself." For example, the Initial Form U4 contains an initial DRP disclosing a November 1, 2001 judgment against Berger, information that was not previously available in CRD. Berger almost certainly supplied this data, as it is unlikely that Millennium personnel would have possessed such information. Similarly, the responses to the deficiency notices in the form of additional DRPs and amendments to an existing DRP contained information that would have been inaccessible to Millennium personnel. We note, moreover, that the DRPs contain first person language such as "I was not employed at the firm at the time of the complaint" and "I was named as the chief compliance officer for failure to supervise."[25]

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[25] Berger states that, when he telephoned CRD shortly before the hearing to determine his status, he was informed by a telephone representative that the two-year window on his association had closed in April 2003. While the Hearing Panel excluded the recording of this telephone call, it permitted Berger

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This conclusion is augmented by Ranni's hearing testimony regarding the registration process. The Hearing Panel found that Ranni "testified credibly" that he likely followed his "usual business practice" of e-mailing to Berger a link to the CRD website, which prompted Berger to review his draft Form U4 and release it to the Firm when the form had been completed. The Hearing Panel also credited Ranni's "description of his customary procedure for submitting a Form U4," based on his "demeanor, the consistency of his testimony, and the lack of any motive to testify less than fully and truthfully."[26]

Berger claims that, to the extent that Ranni was "credible," it was about his standard practices, not

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to testify about the conversation at the hearing. Berger does not seek to adduce the recording into evidence before us.

In any event, Berger's hearsay evidence regarding what the CRD telephone representative told him is not dispositive. The telephone representative's statement that Berger's two-year "window" had closed is correct as far as it goes. If Berger sought registration after April 2003, he would have had to take the relevant licensing examinations. Berger's conversation with the telephone representative does not, however, go to the issue of whether he applied unsuccessfully for registration.

[26] The credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor. *See Rita J. McConville,* Exchange Act Rel. No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3136 n.21, *reh'g denied,* 2007 U.S. App. LEXIS 926 (7th Cir. 2007), *petition denied,* 465 F.3d 780 (7th Cir. 2006); *Daniel Joseph Alderman,* 52 S.E.C. 366, 368 n.6 (1995), *aff'd,* 104 F.3d 285 (9th Cir. 1997); *Jonathan Garrett Ornstein,* 51 S.E.C. 135, 137 (1992).

Berger's application specifically. Berger argues that Ranni's testimony about his normal business practices therefore is irrelevant. As Berger states, Ranni admitted that he never spoke to Berger and never met him until the day of the hearing. Ranni assumed instead that he received responses from Berger, but has no specific memory of any dealings with Berger. Ranni also admitted that it was a superior at Millennium, and not Berger, who directed him to initiate the registration process for Berger. Ranni did not produce any e-mails showing that the Forms U4 were sent to Berger or to anybody else for review and completion, nor did he recall sending a draft form U4 to Berger to complete.

We have relied previously on standard business practices where a witness did not recall specific details.[27] Here, Ranni testified that it was his practice to obtain the applicant's Social Security number, name, and other personal information in order to access the applicant's historical information on CRD. Ranni's account is consistent with Berger's testimony concerning the personal information that Berger provided to Millennium and with the information provided to Berger by CRD's telephone representative. Moreover, the Hearing Panel found specifically that "Ranni credibly testified that he did not update

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[27] *See Micah C. Douglas*, 52 S.E.C. 1055, 1057 (1996) (relying on business practice and standard firm procedure where witness did not have specific recollection regarding the matter at issue).

DRPs." Instead, Ranni sent the DRPs to the applicant to update. As discussed above, the First Amended Form U4 contained detailed changes, in the form of an amendment to an existing DRP page and the addition of two DRPs, largely expressed in the first person singular, with a level of detail suggesting that whoever made those changes was intimately familiar with Berger's disciplinary history.[28] Nothing in the record suggests that Berger communicated any DRP information to Millennium personnel, nor does Berger assert that he shared such information with them.[29] The evidence describes an applicant so actively engaged in the registration process that he not only supplied information for the preparation of an initial Form U4, but also responded promptly to CRD requests for further information that resulted in the filing of two amended Forms U4.[30] We find, therefore,

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[28] Berger notes that the various Forms U4 contained errors such as incorrect addresses for his previous places of residence and business. The presence of such errors, asserts Berger, suggests that he never saw, much less executed, the Forms U4. We reject this argument. The errors in the addresses were *de minimis*: an old residential address was listed as a current address, while a former work address was listed as a residential address.

[29] For this reason, we reject Berger's claim that Esposito or "anyone" could have typed his name on the Forms U4.

[30] In the alternative, Berger argues that even if he had signed the Form U4, he would not have been subject to NASD's jurisdiction because it was investigating Millennium's margin practices and not his conduct in connection with the completion of the application for registration. We disagree with Berger's selective interpretation of the scope of NASD's jurisdiction and

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that NASD had jurisdiction over Berger during the relevant period.

Having established that NASD had jurisdiction over Berger during the relevant period, we find that Berger violated NASD Rules 8210 and 2110 when he failed to appear at the two OTRs. Berger asserts that his failure to appear at the first OTR was "inadvertent – *i.e.,* neither intentional nor reckless, and no worse than excusably negligent." We note that Berger did not respond in any manner to that OTR request until the day of the scheduled OTR, and then only after the time for the scheduled OTR had elapsed. The timing of that response demonstrates that Berger was aware of the date of the scheduled OTR and that a response was required. We also note that, even after NASD accommodated Berger by scheduling a second OTR after consultation with Berger's new counsel, Berger failed to appear.[31] While Berger's failure to appear at the first OTR may have been inadvertent, his failure to appear at the second OTR was, under the circumstances, inexcusable.

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remind him that NASD sought his testimony in connection with its investigation of Millennium.

[31] *See Toni Valentino,* Exchange Act Rel. No. 49255 (Feb. 13, 2004), 82 SEC Docket 711, 717 (noting that NASD made every effort to accommodate respondent by rescheduling the OTR on three occasions and by agreeing to date recommended by respondent's counsel).

## IV.

Berger contends that he should have the ability to challenge NASD's jurisdiction without first appearing at an OTR, and that he should be entitled to do this without the risk that NASD will find that he refused to provide the information and bar him from association. Berger argues that, in order to meet Exchange Act requirements of fundamental fairness, NASD must provide an avenue to challenge jurisdiction before the OTR date (akin to a motion to quash a subpoena in federal court).[32] He asserts that every state, the federal courts, and the New York Stock Exchange ("NYSE") permit jurisdictional challenges without punishment. In support of his argument, Berger cites the Federal Rules of Civil Procedure and Exchange Act Section 21(c).[33]

NASD counters that the Federal Rules of Civil Procedure do not apply to NASD procedures. NASD also points out that the Commission's Rules Relating to Investigations do not afford any procedure for challenging Commission requests for compelled investigative testimony. NASD notes that "[t]echnically," Exchange Act Section 21(c), which authorizes the

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[32] NASD suggests that Berger has waived his fairness argument because he did not raise the issue before the NAC. Nonetheless, we consider Berger's argument under our obligation of *de novo* review. *See Schellenbach v. SEC*, 989 F.2d 907, 909 (7th Cir. 1993) (noting our obligation to conduct an "independent review of facts and law").

[33] 15 U.S.C. § 78u(c).

Commission to enforce its subpoenas in district court in the event of "contumacy by, or refusal to obey" a Commission subpoena, does not provide a procedure by which the recipient of a Commission subpoena may affirmatively challenge the subpoena.[34] Rather, NASD argues, Exchange Act Section 21(c) is a means by which the Commission may enforce a subpoena. Exchange Act Section 21(c) provides that the failure to abide by a legitimate subpoena is a misdemeanor.[35]

We believe that NASD is correct. Unlike the NYSE, NASD does not have a mechanism for resolving questions of jurisdiction prior to the time of a

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[34] Generally, courts have held that a recipient of a Commission administrative subpoena is not permitted to challenge the subpoena in court before the Commission commences a subpoena enforcement action and instead must wait for the enforcement action. *Bird v. SEC*, 1980 U.S. Dist. LEXIS 11799, at *4 nn.5 and 7 (D.P.R. May 19, 1980) (noting that the Commission's "administrative subpoenas are not self-executing," that Commission rules "do not provide a procedure by which recipients of an administrative subpoena can move to quash it," and that "any person who is subpoenaed may refuse to comply for just cause and await the Commission's institution of a subpoena enforcement action. At that time, he has the right to contest the enforcement of the subpoena"). Some authority to the contrary exists. *See, e.g., Ayers v. SEC*, 482 F. Supp. 747 (D. Montana 1980) (finding that court had jurisdiction to stay Commission investigation pending evidentiary hearing in action by plaintiffs to enjoin investigation or quash subpoenas issued by Commission, prior to subpoena enforcement action, where plaintiffs alleged "irreparable harm" as a result of, among other things, Commission investigators implying to third parties that plaintiffs were guilty of fraud and wrongdoing).

[35] 15 U.S.C. § 78u(c).

respondent's scheduled appearance at an OTR.[36] NASD followed its rules in this proceeding. Its procedures were in accordance with the "fair procedure[s]" contemplated by Exchange Act Section 15A(b)(8).[37] We have held, as we did in *Jay Alan Ochanpaugh,* that subjecting oneself to NASD's disciplinary process and relying on NASD's procedures is the appropriate route to challenge NASD jurisdiction.[38]

In the alternative, Berger urges that NASD be required to make its sanctions conditional, giving Berger an opportunity to testify in the event that the jurisdictional challenge is resolved against him and it is determined that he was in fact subject to NASD jurisdiction at the time of the OTR request, a practice

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[36] We disagree that the NYSE Hearing Panel Decisions which Berger cites in support of his conditional sanction argument are "directly analogous" to this proceeding. In fact, those NYSE decisions are not a proper basis for comparison and, moreover, would similarly have no precedential effect in a Commission review proceeding of NYSE disciplinary action.

[37] 15 U.S.C. § 78o-3(b)(8).

[38] *See Jay Alan Ochanpaugh,* Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 (explaining that "the only recourse against possible overreaching by NASD is for the person to whom the [Rule 8210] request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission"). *See also Allen Douglas Secs., Inc.,* Exchange Act Rel. No. 50513 (Oct. 12, 2004), 83 SEC Docket 3570, 3579-80 (observing that if member firm had subjected itself deliberately to NASD disciplinary sanction by engaging in the conduct warned against in an NASD staff interpretative letter to the firm, NASD's disciplinary action would have been reviewable by the Commission).

employed by the NYSE. Berger asserts that, throughout the proceedings below, he assumed that (as his attorney argued), should any sanction be assessed against him, it would be conditional. NASD's procedures are no less "fair procedure[s]" under the Exchange Act even though the NYSE has different procedures. The fact that the NYSE permits persons from whom it seeks information to lift their bars by testifying does not compel the conclusion that NASD's practice is unfair. Moreover, we have recognized the importance of NASD's need for timely information.[39]

V.

We may cancel, reduce, or require remission of a sanction imposed by NASD if we find, having due regard for the public interest and the protection of investors, that NASD's sanction is excessive or oppressive or imposes an unnecessary burden on competition.[40] We make no such finding here.

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[39] *See, e.g., PAZ Secs., Inc.*, Exchange Act Rel. No. 52693 (Oct. 28, 2005), 86 SEC Docket 1880, 1889 (stating that "[w]hen members and associated persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations fully and expeditiously"), *appeal filed*, No. 05-1467 (D.C. Cir.).

[40] *See* Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2). Berger does not claim, nor does the record show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

NASD Sanction Guidelines provide that a bar is the standard sanction for an NASD Procedural Rule 8210 violation where an individual fails to respond in "any" manner; where mitigation exists, or where the individual did not respond in a timely manner, the recommended sanction is a two-year suspension.[41] Berger contends that NASD erred in rejecting his reliance-on-advice-of-counsel defense as a mitigating factor. Berger states that, while we have held repeatedly that reliance on counsel's advice does not excuse an associated person's obligation to testify or cooperate with NASD investigations,[42] our precedent "cannot possibly apply when the advice pertains to jurisdiction." Berger argues that, at the very least, his reliance on the advice of his counsel was a mitigating factor, and consequently, the sanction imposed

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[41] NASD Sanction Guidelines (2001 ed.) at 39. *See also Ficken*, 89 SEC Docket at 696 n.38; *Hershberg*, 87 SEC Docket at 498.

[42] *Valentino*, 82 SEC Docket at 718 and n.10. *See also Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000) (finding reliance on counsel no excuse from obligation to supply information to NASD); *Sundra Escott-Russell*, 54 S.E.C. 867, 874-75 (2000) (finding that respondent was not relieved from obligation to respond to NASD's requests by her lawyer's advice). Berger attempts to distinguish *Valentino* on the ground that her noncompliance was not based on jurisdiction, but on an unrelated issue. We reject this contrast; there are many reasons for noncompliance, and Berger's excuse is no more compelling than Valentino's.

against him should be a suspension of no more than two years.[43]

While we recognize that a valid claim of reliance upon counsel may have a mitigating effect on sanctions, we have held that, in order to establish such a defense, a respondent must show that he made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice.[44] We find no such showing here. Berger does not claim that his counsel advised him that noncompliance with an NASD request for information while contesting jurisdiction was legal. Moreover, Berger does not assert that his "inadvertent" failure to comply with the first OTR was based on reliance on the advice of counsel.

Berger's failure to appear at two OTRs is particularly troubling in light of the importance of NASD Procedural Rule 8210. Compliance with NASD's rules requiring cooperation in investigations is imperative if NASD is to perform its self-regulatory functions effectively. As we have stated previously, "NASD should not have to bring disciplinary proceedings, as

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[43] Berger claims that his reliance on the advice of counsel was reasonable because he knew that he did not sign and submit a Form U4.

[44] *See, e.g., Valentino*, 82 SEC Docket at 718 n.11 (citing *SEC v. Savoy Indus. Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981)); *Hal S. Herman*, 55 S.E.C. 395, 403 (2001) (enumerating the same factors).

it was required to do here, in order to obtain compliance with its rules governing its investigations."[45] Accordingly, we find that the standard sanction of a bar is warranted.

An appropriate order will issue.[46]

By the Commission (Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY; Chairman COX not participating).

Nancy M. Morris
Secretary

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[45] *Valentino*, 82 SEC Docket at 719.

[46] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55706/May 4, 2007

Admin. Proc. File No. 3-12393

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary
Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Howard Brett Berger, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of December, two thousand and nine,

Before: Jon O. Newman,
Barrington D. Parker,
Debra Ann Livingston,
Circuit Judges.

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Howard Brett Berger,

Petitioner,

v.

Securities and Exchange Commission,

Respondent.

**ORDER**

Docket Number: 09-0062-ag

(Filed Dec. 3, 2009)

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Howard Brett Berger having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Franklin Perez, Deputy Clerk

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

**15 U.S.C. § 78s(d)** Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) * * * *

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

**15 U.S.C. § 78s(e)** Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction) –

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the

self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

**15 U.S.C. § 78o-3**. Registered securities associations

* * *

(b) Determinations by Commission requisite to registration of applicant as national securities association

An association of brokers and dealers shall not be registered as a national securities association Unless the Commission determines that –

* * *

8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

**NASD Procedural Rule 8210**[1] provides in relevant part:

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required

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[1] NASD Procedural Rule 8210 is now incorporated and as FINRA Rule 8210, which has since been amended in a manner that is not relevant to the issues here.

to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

* * *

(c) No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.